90-1669

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TYLER C. DIXON,
Petitioner,

v.

RICHARD N. HUBERT and CHAMBERLAIN, HRDLICKA, WHITE, JOHNSON and WILLIAMS,
Respondents.

Petition for Writ of Certiorari to the Supreme Court for the State of Georgia

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner timely raised a constitutional attack on Official Code of Georgia (hereinafter "O.C.G.A.") Section 9-15-14 in every court below, but no court has ruled on or even acknowledged the existence of Petitioner's constitutional claims.

Georgia has two abusive litigation statutes, O.C.G.A. Section 9-15-14 (see 22a; hereinafter "9-15-14") and O.C.G.A. Sections 51-7-80 *et seq.* (see 23a; hereinafter "51-7-80" for convenience). Both provide rights and remedies for the same cause of action, but provide for different procedures. The only material difference in the nature of the claims is explained in O.C.G.A. Section 51-7-83 (b) and (c). See 26a. If the only damages claimed by the complainant are litigation expenses, Section 9-15-14 is the exclusive remedy. If other damages are claimed, the complainant may pursue his claims under 9-15-14 or 51-7-80, or both. Section 51-7-80 *et seq.* provides respondents with all of the procedural safeguards normally afforded other civil litigants, such as rights (i) to jury trial, (ii) to discovery and other rights under Georgia's Civil Practice act, (iii) to demand as a matter of right a pre-trial conference and entry of a pre-trial order, (iv) to seek post-judgment remedies through motions for new trial or judgment n.o.v., (v) and the right to direct appeal. 51-7-80 respondents also have the "complete defense" of good faith available to them. None of these safeguards is available to 9-15-14 respondents, except in the limited and subjective circumstance of a good faith attempt to change the law based on existing or persuasive principles, a respondent may argue good faith as a defense.

Also, at the time the underlying case arose, there was a third "abusive litigation" cause of action in Georgia arising out of *Yost v. Torok*, 256 Ga. 92 (1986), which adopted the material statutory language of 9-15-14. This

common law abusive litigation claim was replaced by 51-7-80 (often referred to as "statutory *Yost*"), but this case overlapped so that all three abusive litigation causes of action were available to Hubert. Hubert pursued 9-15-14. Petitioner Dixon timely moved to strike the statute as unconstitutional unless granted the same safeguards as other litigants. The court declined to rule on the motion, though it was effectively denied.

Against this background, the questions presented are:

1. Does O.C.G.A. Section 9-15-14 (one of Georgia's abusive litigation statutes) violate a respondent's rights to due process and equal protection under the 14th Amendment of the United States Constitution by denying such respondents the fundamental rights normally afforded civil litigants? O.C.G.A. Section 9-15-14, Sections 51-7-80 *et seq.*, and Section 5-6-35 (the discretionary appeal statute) appear in their entirety as Appendix K.

2. Whether attorney-respondents in 9-15-14 claims are even further discriminated against as a class and denied constitutional due process and equal protection by reason of their inability to defend themselves without violating the duty owed to their clients.

3. Whether Section 9-15-14 unconstitutionally denies due process and equal protection in light of the discretionary appeal statute, Section 5-6-35 (10), which make 9-15-14 claims the only cause of action in Georgia in which a money judgment can exceed $2,500.00 without the losing party having a direct right of appeal. Judgments for abusive litigation claims pursuant to 51-7-80 give the right of direct appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Georgia dated January 10, 1991, affirming without opinion (Motion for Reconsideration denied, February 4, 1991), the judgment of Fulton Superior Court (the trial court).

OPINIONS OF COURTS BELOW

On December 18, 1989 the trial court, Fulton Superior Court, rendered judgment (filed December 19, 1989) against Petitioner Dixon in the amount of $59,480.84 for attorneys fees pursuant to O.C.G.A. Section 9-15-14, which judgment did not include any findings of fact or conclusions of law (20a). Petitioner's Application for Discretionary Appeal to the Georgia Court of Appeals was denied without opinion on February 2, 1990 (19a) as was his Motion for Rehearing in that Court on February 8, 1990 (18a). Petitioner was then granted a Writ of Certiorari by the Georgia Supreme Court on March 8, 1990, which reversed the Court of Appeals' denial of discretionary appeal and remanded the case to the trial court for findings of fact and conclusions of law (17a). Without further hearing, the trial court adopted verbatim Hubert's proposed findings of fact and conclusions of law (striking only one line) and entered same on April 25, 1990 (6a). The Georgia Supreme Court then affirmed the trial court's judgment without opinion (5a) on January 10, 1991, and denied Petitioner's Motion for Reconsideration on February 4, 1991 (1a). Also on February 4, 1991, The Supreme Court denied Hubert's Motion to direct the trial court to assess yet more attorneys fees with respect to Dixon's appeals, but did so without prejudice to Hubert's right to seek such relief in the trial court upon remittitur (4a). At no time has any court addressed or ruled on Dixon's constitutional attack on 9-15-14.

JURISDICTION

The final judgment of the Georgia Supreme Court, its denial of Petitioner's Motion for Reconsideration, was entered on February 4, 1991. Petitioner timely raised the constitutional questions of denial of due process and equal protection of the laws under the Fourteenth Amendment of the United States Constitution in all courts below. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable Federal Constitution provision is United States Constitution Amendment XIV. Section 1 of the 14th Amendment to the U.S. Constitution provides, in pertinent part, ". . nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Georgia Constitution guarantees these same rights. Ga. Const. (1983), Art. I, Sec. I, Pars. 1 and 2. The Georgia Constitution emphasizes equal protection by providing "Protection to person and property is the *paramount duty* of government and *shall be impartial and complete.* No person shall be denied the equal protection of the laws." (emphasis supplied) *Id.*, Par. 2.

STATEMENT OF THE CASE

Petitioner was attorney for three plaintiffs, A. H. Lostocco, MManTec, Inc. and Professional Auto Care, Inc. ("PACI") who filed suit against Respondent Hubert and his law firm (hereinafter "Hubert") and Hubert's former clients (hereinafter "Aycock/Tripoint"). Plaintiff Lostocco and Defendants Aycock/Tripoint, along with others, were involved in a business venture known as Airport Parking Venture I ("APVI" or "Carport"). Dixon also represented The Carport. The Complaint claimed defamation, invasion of privacy and tortious interference with property. See Appendix L and the description of the parties and related entities therein. Aycock/Tripoint sent a

Strategies & Tactics Memo (titled "Carport—Legal Questions and Strategy", and attached as Appendix M, 37a) to their attorney, Hubert. This Strategies & Tactics Memo outlined allegations of criminal securities violations, theft, fraudulent bookkeeping, tax reporting violations, mismanagement and other wrongdoing on the part of the plaintiffs. The Strategies & Tactics Memo also outlined the goals sought by Aycock/Tripoint, and possible tactics by which Hubert and Aycock/Tripoint might achieve these goals for Aycock/Tripoint, and Hubert admitted that he used it as a guide or outline.

Hubert was specifically retained by Aycock/Tripoint to accomplish the expressly stated goals outlined in the Strategies & Tactics Memo, which included (a) Remove Lostocco as managing partner of Carport; (b) Force a buy-out of Tripoint's interest in Carport; (c) Avoid the payment of Tripoint's capital call obligation (which was past due); (d) Reinstate Aycock/Tripoint to the Board of Managing Partners of The Carport—even though they were precluded from participating on such board under the partnership agreement so long as they were in arrears on capital call obligations; (e) Have The Carport pay various vendors who were suing Tripoint; and (f) Force the Carport to pay Aycock/Tripoint's attorneys fees owed to Hubert.

The strategies and tactics proposed to achieve the above stated goals included, among other things, confronting The Carport with (1) Threats of selective criminal prosecution; (2) The mention of possible adverse impact on a securities offering then being offered by a Carport partner other than the plaintiffs; (3) Threats of receivership, dissolution and involuntary bankruptcy (any of which would destroy a securities offering); and (4) Adverse publicity and disclosures.

After reviewing that Strategies & Tactics Memo, Hubert published said defamatory memo and threats to one Jack Gray, an attorney representing a party threatening legal action against both the plaintiff Lostocco and The Carport.

Thereafter, Hubert sent the "Hubert letter" via hand delivery on August 22, 1988 to Aycock/Tripoint (43a). The Hubert letter falsely accused the plaintiffs of criminal misconduct, theft, fraudulent bookkeeping, securities violations, conflicts of interest, mismanagement, breach of the APVI partnership agreement, and other misconduct. The letter also threatens or urges that the subject matter be reported to the county district attorney, state and federal regulatory agencies, and to Carport partners who were not clients of Hubert, and further advised "invoking criminal and securities sanctions." The Hubert letter also distorted the nature of a "blind trust," inaccurately calling the unknowing beneficiary a "silent but active partner." This invasion of privacy threatened to destroy the very purpose of the trust. In two places the letter urges and invites Aycock/Tripoint to communicate the contents of the letter to Carport Partners, who at that time were adversaries in then pending litigation asserted against The Carport by Hubert on behalf of Tripoint. *I.e.*, Hubert was advising his client to communicate the defamatory matter and threats to adversaries in then pending litigation. At that time Hubert knew that Dixon represented the Carport in said litigation, but made no effort to communicate with Dixon. On the same date of the Hubert letter, Aycock/Tripoint delivered a copy of same to the chief financial partner of The Carport, who soon commenced steps to prematurely remove Lostocco as managing partner of The Carport, to terminate The Carport's ongoing business relationship with MManTec, to refuse to pay $98,000.00 admittedly owed to MManTec, and to refuse to remit monies received in trust for PACI.

Within approximately 6 months after the Hubert letter, Aycock/Tripoint had accomplished *all* of the above mentioned goals set forth in the Strategies & Tactics Memo without taking any legal action. In short, the "confrontation" tactics were effective.

Upon receipt of a copy of the Hubert letter (on August 23, 1988), Dixon attempted to call Hubert twice, without success, and then sent a letter to Hubert demanding re-

traction (46a) on August 30, 1988. No response was forthcoming, though Aycock/Tripoint sent another memo with similar threats to all partners of The Carport, purporting to do so under advice of counsel. Dixon sent another letter to Hubert inquiring about the Hubert Letter (49a) and finally received a response from Hubert (50a) refusing to communicate about the matter and stating "If you believe . . that you have been defamed, then sir, I leave you to your remedies." Hubert refused to communicate with Dixon, and since Aycock/Tripoint was represented by Hubert, Dixon could not communicate directly with them. The threats and defamatory statements contained in the Hubert letter and the Strategies & Tactics Memo threatened to destroy the businesses of the three plaintiffs, yet the position taken by Hubert prevented any possibility of amicable resolution. To stop further damage, the plaintiffs had no alternative but to file suit.

Before filing suit, because one of the proposed defendants was an attorney, and because issues such as privilege were likely to be raised, Dixon consulted with his law partner and three other independent attorneys on the issues, all of whom concurred with Dixon's assessment that the claims against Hubert were viable. After Hubert filed his initial abusive litigation counterclaim, Dixon consulted (at his own expense) yet another attorney specializing in professional liability, who also concurred with Dixon's assessment that the claims against Hubert were viable.

As discovery commenced, defendants stated their intention to subpoena the major customer of plaintiff for depositions. Concerned of the possible damage that would result, plaintiffs offered mutual dismissals. Aycock/Tripoint agreed, but Hubert refused, insisting on his abusive litigation counterclaim. Then certain witnesses who had given information to Dixon concerning the case completely changed their testimony in deposition without warning to Dixon. One of these witnesses, Jerry Davis, having previously informed Dixon that he had received the Hubert

letter and other defamatory communications, testified in deposition that he had never seen the letter. Though five persons signed affidavits confirming that this testimony contradicted Mr. Davis' previous statements, the damage of such inconsistent testimony was such that Dixon prevailed upon the plaintiffs to dismiss the Complaint within a week after the Davis deposition. This left the counterclaims pending, and then Hubert filed 9-15-14 motions against the plaintiffs and Dixon.

Due to the conflict of interest created by these motions, Dixon applied for leave to withdraw on June 29, 1989, which leave was not granted until August 28, 1989. During this interim time, since he remained counsel for the plaintiffs, Dixon could take no steps to defend himself, and continued to act consistent with the best interest of the plaintiffs. Soon after learning his leave to withdraw had been granted, Dixon filed a motion attacking the constitutionality of 9-15-14 and seeking the procedural safeguards normally afforded other civil litigants in Georgia. The Court declined to rule on the motion, effectively denying the relief sought in the motion.

A "hearing" was conducted in which Dixon was denied the most fundamental due process rights (see the discussion in section I(B)(2)(b) of this petition regarding "erroneous deprivation"). The Court ruled from the bench that Dixon's good faith was immaterial, and excluded from evidence the Davis documents (proffered to show Dixon's good faith expectation that Davis' testimony would be different from that given in his deposition) and that segment of Dixon's investigation which was offered to show Dixon's justification for asserting the claims. Dixon was not allowed to testify about documents admitted into evidence and about which Hubert testified at length. Over objection, Dixon was forced to read into the record excerpts of affidavits and other documents of Dixon's former client selected by Hubert without the right to have the entire affidavit or document put into evidence and without being allowed to explain. The Court also refused to allow Dixon or any of the attorneys with whom

Dixon consulted to testify concerning Dixon's good faith consultations with them (both before and after filing the complaint) and their concurrence with Dixon's analysis of the issues. The Court refused to allow Dixon or two other attorneys who represented the plaintiffs, to testify about their knowledge and communications with the plaintiffs concerning the plaintiffs' conduct, motives and restrictions on Dixon's authority to act.

Dixon had been virtually handcuffed by his clients who refused to authorize him to take various depositions or consult with certain witnesses, yet refused to allow him to dismiss the case. When Dixon initially attempted to withdraw, the defendants Aycock/Tripoint put Dixon and the plaintiffs on notice that they would assert 9-15-14 claims against any attorney who took over the case for the plaintiffs. Therefore, it became virtually impossible to obtain counsel to represent the plaintiffs to pursue the plaintiffs' claims. All the while, Hubert refused mutual dismissals, and the litigation proceeded with the emphasis almost entirely on the abusive litigation claims, until Dixon finally prevailed upon the plaintiffs to authorize him to unilaterally dismiss the complaint.

On December 18, 1989, the trial court awarded Judgment in favor of Hubert against Dixon in the amount of $59,480.84.

REASONS FOR GRANTING THE WRIT

I. CONSTITUTIONAL REASONS FOR GRANTING THE WRIT.

A. Though Petitioner Timely Asserted His Constitutional Attack on O.C.G.A. Section 9-15-14 in Every Court, no Court Below Has Ever Ruled on or Addressed the Constitutional Issues.

In fact, the courts have still not even acknowledged the existence of Petitioner's constitutional attacks. It does little good to have constitutional rights if claims that such rights have been denied can be ignored by the courts

without opinion or other ruling. The Georgia Supreme Court has commented that it would regard a refusal on its part to adjudicate a litigant's "claim of constitutional infringement an abdication of our constitutional duties." *McDaniel v. Thomas*, 248 Ga. 632, 633 (1981). Nevertheless, the Georgia Supreme Court, the Georgia Court of Appeals and Fulton Superior Court (the trial court) have all refused to adjudicate or even acknowledge the existence of Petitioner's claim of denial of constitutional rights.

B. Due Process.

1. *A Meaningful Opportunity to be Heard Is Required.*

The fundamental requisites of due process of law are notice and an opportunity to be heard. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); *Link v. Wabash*, 370 U.S. 626, 82 S. Ct. 1386. The hearing must be at a meaningful time and in a meaningful manner. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Essential to an opportunity to be heard is the right to a reasonable time, after notice, for preparation of a defense to a proceeding or suit. *Mullane v. Central Hanover Bank & Trust Co.*, 336 U.S. 306, 70 S. Ct. 652 (1950).

The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1969), citing *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951). In this case, Petitioner Dixon was condemned to suffer grievous loss, in that he suffered a $60,000.00 judgment, and remains confronted with the spectre of additional attorneys fees upon remittitur ("tens of thousands of dollars") requested by Hubert for having to respond to Dixon's appellate efforts. The grievousness is intensified by the denial by Dixon's professional liability carrier of coverage or duty to defend these claims. Such grievous loss certainly warrants fairly extensive procedural due process safeguards.

2. *Three-Fold Test for Procedural Adequacy.*

The standard test of procedural adequacy under the due process clause is outlined in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1975). This Court held "that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

(a) *Private interest.* Given the approximate judgment of $60,000.00 already entered, and the expressed intent to seek "tens of thousands of dollars" in additional fees for responding to appeals, it is clear that a substantial property interest is involved. Such is frequently the case in 9-15-14 cases, because unlike Fed. R. Civ. P. 11, 9-15-14 claims are pervasive, and are not calculated to shift the cost of a "discrete event" as is the case with Rule 11, but to shift the cost of the entire litigation. *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, —— U.S. —— Docket No. 89-1500, decided February 26, 1991 (affirming 892 F.2d 802). Therefore, the potential exposure to liability in 9-15-14 cases is enormous. In addition to the monetary damages mentioned above, the private interest at stake in 9-15-14 claims includes the disruption of the attorney-client relationship in pending litigation, and the reduced access to the Courts. Clearly, the "private interest" is substantial.

(b) *Risk of erroneous deprivation.* There is a substantial risk of erroneous deprivation in 9-15-14 cases because of the lack of any meaningful procedural safeguards. This is generally true, but was especially true in the case *sub judice*. The "hearing" afforded Dixon was hardly meaningful. Though Dixon voluntarily dismissed

the plaintiffs' complaint on June 22, 1989 (long before the close of discovery) and thereafter promptly applied for leave to withdraw as counsel for the plaintiffs (as is required under Georgia Uniform Superior Court Rule 4.3) on June 29, 1989, the Court did not sign the order granting such leave until August 28, 1989 even though the plaintiffs had consented to the withdrawal. The Court did not give notice that the order had been signed. The time for discovery expired on August 31, 1989, and Dixon did not learn that he had been relieved of his duties as counsel for the plaintiffs until after the expiration. Dixon had no opportunity at discovery. In his motion attacking the constitutionality of 9-15-14, Dixon also sought the right to discovery under the Georgia Civil Practice Act and the right to a trial. The Court declined to rule on the motion, and effectively denied same.

Due process is flexible and calls for such procedural protections that the particular situation demands. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1971). "Whether or not one is deprived of the fundamental right to a fair hearing depends upon the facts of each case." *Brownlee v. Williams*, 233 Ga. 548, 556 (1975). The "hearing" afforded Dixon was by no means fair: 1) Hubert was allowed to use deposition testimony from depositions taken before Dixon was a party to the case, and at a time when Dixon could neither represent himself or have someone represent him at any such deposition or with respect to the deposition witnesses. 2) Hubert was allowed to cross examine Dixon regarding documents Hubert refused to mark or identify as exhibits or tender in evidence. 3) Dixon was ordered by the Court, over objection, to read excerpts of an affidavit of the plaintiff Lostocco which had been prepared by another counsel for Lostocco after Dixon had withdrawn as counsel for Lostocco, and Dixon was not allowed to elaborate or explain the excerpts, nor was he allowed to have the entire affidavit put into evidence. 4) Hubert was allowed to introduce such excerpts from Lostocco's affidavit even though Lostocco

was present in the courthouse and available to testify. 5) Even had Lostocco testified, Dixon could not have had any meaningful cross examination of Lostocco by reason of the attorney-client privilege arising from Dixon's former representation of Lostocco. Two attorneys who also represented Lostocco were informed by the Court that if they testified about anything regarding their representation of Lostocco, such testimony would constitute a complete waiver of Lostocco's attorney-client privilege for all matters, regardless of whether such matters were related to the occurrences in question. Since both said counsel represented Lostocco on wholly unrelated matters, the Court's ruling was tantamount to a prohibition against any such testimony by said counsel or Lostocco. 6) Dixon was not allowed to testify about documents which had been admitted into evidence without objection, and about which Hubert had testified at length. 7) Furthermore, the Court ruled from the bench that Dixon's good faith in his conduct was immaterial. 8) Dixon's subpoena of relevant documents corroborating the consequences of the Hubert conduct complained of in the underlying case was quashed by the Court, and Dixon was not even allowed to review them. 9) An attorney who had prepared a "blind trust" document which was a material portion of the underlying defamation and invasion of privacy claims, was not allowed to describe said document accurately, because the court instructed the witness not to use the term "blind," or similarly describe the document. 10) The "hearing" was conducted in such a manner as to improperly shift the burden of proof to Dixon, the responding party, and then the court refused to allow Dixon to proffer testimony or documentary evidence to rebut Hubert's claims. Such a hearing did little more than pay "lip service" to the concept of due process, and was reduced to "a facade." See *Brownlee, supra* at 555.

Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine witnesses. *ICC v. Louisville & N.R. Co.*, 227

U.S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963); *Goldberg v. Kelly*, 397 U.S. 254, 269 (1969). The effective denial of confrontation and cross examination of witnesses unreasonably increases the risks of an erroneous determination. Similarly, the denial of such fundamental right to testify about documents which had already been admitted into evidence and testified about by the other party is so well established, that its denial is inconsistent with even the most *de minimis* standard of due process. This is especially true where the respondent to the abusive litigation claims vigorously denied the facts asserted by the movants.

Corroborating the fact that the lack of procedural safeguards increased the risk of an erroneous determination by the trial court is the fact that the trial court's findings of fact are filled with inconsistencies and contradictions. It is simply not supported by the evidence. For example, the trial court did not even properly identify the parties. Throughout its findings in numerous places, the trial court referred to Jinna Management as a plaintiff. Jinna Management was not a party to the litigation. It made no findings with respect to MManTec. Furthermore, it erroneously found as a matter of fact that the only defamation asserted against Hubert was the publication of the Hubert letter (Appendix N, 43a), but Dixon repeatedly asserted that he also based the claim on the publication of the Strategies & Tactics Memo by Hubert to another person with whom he had no confidential or business relationship (i.e., with whom he claimed no privileged relationship). Hubert admitted that communication. The trial court ignored that fact. Similarly, the trial court erroneously "found" that the plaintiffs' only claim of invasion of privacy related to the distribution of an unfavorable magazine article. However, Dixon testified that the main privacy invasion was the disclosure (albeit a distorted one) of the Harris Morris "blind trust." The court ignored this.

The trial court erroneously states that there was no evidence of malice on the part of Hubert, but the uncontradicted evidence was that the Hubert letter claimed to have obtained a sworn statement from a person Hubert and his client knew had not given any sworn statement. Hubert accused the plaintiffs of criminal securities violations, yet Hubert and his client later admitted that they never suspected the plaintiffs of any securities violations, but suspected Richard Felker (not named in the letter, but to whom Aycock delivered the letter, because Felker had the power to discharge Lostocco). It is difficult to imagine that knowingly communicating a false statement, especially when the false statement imputes criminal conduct to another person, does not reveal some evidence of malice. *Jordan v. Hancock*, 91 Ga. App. 467 (1955). It was uncontradicted that Hubert obtained a statement by improperly using the subpoena power of a court in a case where he was counsel of record. Without notice to anyone, he used a deposition subpoena to compel an otherwise unwilling witness to give him a statement, which he thereafter used against the plaintiffs. Though Dixon was counsel of record in the case in which the subpoena was issued, Hubert admits that he made no effort to give Dixon notice of any deposition. Hubert charged plaintiffs with breach of contract, but admits he never read any contracts. Hubert admits that he contemplated that the letter, with all its threats of criminal prosecution, would be delivered to Carport partners when he knew the Carport was represented by Dixon. All this constitutes *some* evidence of malice under Georgia law. "Personal ill will is not essental" to a finding of malice. *Vickers v. Motte*, 109 Ga. App. 615, 619 (1964); *Luke v. Dupree*, 158 Ga. 590, 596 (1924). Reckless disregard of the truth is the equivalent of malice. *Melton v. Bow*, 145 Ga. App. 272, 273 (1978). Likewise, a reckless exaggeration of the truth is evidence of malice, *Anderson v. Housing Authority of Atlanta*, 171 Ga. App. 841, 843 (1984); as is the failure to state a matter "fully and fairly with respect to the plaintiff" or to make state-

ments which are "exaggerated, overdrawn or colored to the detriment of plaintiff." *Atlanta Journal v. Doyal*, 82 Ga. App. 321, 333 (1950). In view of this applicable law, the Hubert letter itself gives evidence of malice, especially in light of the Strategies & Tactics Memo pursuant to which it was written.

The Court made a finding based on "testimony" from Mr. Lostocco, but Mr. Lostocco did not testify at the hearing. In *Goldberg v. Kelley, supra*, at 271, the Court said that the "decision maker's conclusion must rest solely on the legal rules and evidence adduced at the hearing." The obvious reason for such a requirement is that consideration of evidence adduced outside the hearing would deprive the party against whom the evidence is offered of the opportunity to confront, cross examine and otherwise rebut the evidence. See *Lonzollo v. Weinberger*, 534 F.2d 712, 714 (7th Cir. 1976).

It cannot be doubted that meaningful opportunity to prepare and go through the same discovery procedures that Hubert was afforded would have reduced the risk of an erroneous ruling. Likewise, the unfettered right to confront, cross examine and rebut adverse witnesses would also have facilitated the search for truth and accuracy. Had the court allowed Dixon the same opportunity to testify about documents admitted in evidence that was afforded Hubert, the risk of an erroneous ruling would have been greatly diminished. See *Crook v. Baker*, 584 F. Supp. 1531 (E.D. Mich. 1984) at 1560 where the Court held that "the inquisitorial, circus-like free-for-all which constituted plaintiff's 'hearing,' as a whole, resulted in a great risk of erroneous deprivation." The same erroneous deprivation resulted from the "hearing" afforded Dixon in this case.

(c) *Government's Interest.* There is no governmental interest to be subserved through denial of due process to 9-15-14 respondents. It cannot be argued that some fiscal benefit is to be gained through summary adjudication of abusive litigation claims, because there would then be no

explanation for the granting of all due process safeguards in abusive litigation claims pursued under 51-7-80. But even if a valid argument could be made for summary adjudication, that would not explain or excuse the grant of those fundamental rights (and options) to the complainant while denying them to the respondent. The gist of the *Mathews* standards is simply to require a comparison of the costs and benefits of giving the litigants a more elaborate procedure than he actually received. *Parrett v. City of Connersville*, 737 F.2d 690, 696 (7th Cir. 1984). There is simply no reason for not having given petitioner a more elaborate hearing.

If the governmental interest in legislating these two abusive litigation statutes is the deterrence of abusive or frivolous litigation, then 9-15-14 is contrary to that interest when viewed in light of 51-7-82(a) and 51-7-84 (25a and 27a). 51-7-84 provides that the complaining party must give a 30 day notice to cure the alleged abusive action as a condition precedent to bringing an action under 51-7-80. If the respondent recants by withdrawing the allegedly abusive action within the 30 days, or prior to a court ruling thereon, such withdrawal is a "complete defense" to a suit under 51-7-80. This reasonable provision protects both sides. If one makes an error by asserting an abusive position, the other side can deter same by giving notice. The party who initially erred may avoid abusive litigation claims by recanting within the time provided. This enables the parties to "get back on track," and adjudicate the main claim on its substantive merits. Unfortunately, 9-15-14 interferes with this objective. There is no notice requirement under 9-15-14, nor does a withdrawal of the abusive action provide a defense to an abusive litigation claim under 9-15-14. The very act of avoiding liability under 51-7-80 (by withdrawing the action), could constitute an admission against interest with respect to a claim asserted for the same wrong under 9-15-14. A party receiving notice under 51-7-84 is then confronted with the alternative of

recanting (and thereby perhaps tacitly admitting liability under 9-15-14) in order to avoid liability under 51-7-80 *et seq.*, or pursuing the case to avoid such "admission" and to preserve the procedural safeguards available to him under 51-7-80 but not under 9-15-14. Hence, 9-15-14 actually acts to encourage the pursuit of a claim which might otherwise have been withdrawn, and discourages the early resolution of such claim. Of the two statutes, 51-7-80 is clearly superior, and is the only abusive litigation statute that actually subserves any legitimate governmental purposes. 9-15-14 serves contrary purposes, and that is precisely the result in the case *sub judice*. Dixon and the plaintiffs sought to dismiss their claims much earlier, but dismissal was deterred by Hubert's insistence upon his abusive litigation claims. Had 51-7-80 been the only abusive litigation statute in effect, the claims would have been dismissed much earlier, and none of the extraordinary litigation over the abusive litigation claims would have occurred, nor would Hubert have incurred even a fraction of the expenses he now claims. 9-15-14 simply encourages litigants to litigate for litigation's sake.

The problem is further exacerbated by the vagueness of 9-15-14. Due process requires that a state provide meaningful standards to guide the applications of its laws. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). A state law that lacks such standards is void for vagueness. This rule applies to laws that vest standardless discretion in the trier of fact. See *U.S. v. Batchelder*, 442 U.S. 114, 123 (1979) and *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-403 (1966). Abusive litigation law in Georgia has been referred to as the "Many Headed Hydra." Gruber, *Battling the Many Headed Hydra*, 25 Ga. St. B.J. 65 (1988); *Ferguson v. City of Doraville*, 186 Ga. App. 430, 432 (1988), referring to the "mind-numbing battle with the many-headed hydra of abusive litigation law."

"In evaluating a facial challenge to a State law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Kolender, supra,* at 355, quoting from *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494, n. 5 (1982). The central elements of abusive litigation claims, whether brought under 9-15-14 or 51-7-80, are whether there are any "justiciable issues," and, if so, whether there was "substantial justification" for bringing the action. Both of these issues are subjective and involve factual determinations as well as legal construction. There has been virtually no help from the appellate decisions construing 9-15-14, so the trial judges are "on their own." One of the reasons for the dearth of appellate construction of this statute is the discretionary appeal procedure. This, when coupled with the "any evidence" standard of judicial review to support the trial court's findings on the justiciability issue (*Haggard v. Board of Regents*, 257 Ga. 524 (1987), vests the trial judge with absolute discretion. The Georgia Supreme Court's remand to the trial court (17a) for findings did nothing more than require the addition of "magic words" to trace the language of the statute. Such a standard is wholly inadequate (indeed perverse) where the burden is supposed to be on the *movant* in 9-15-14 to prove a "complete absence of any justiciable issue of law or fact." For example, does evidence of no furniture in one room of a ten room house constitute "any evidence" sufficient to affirm a "finding" of complete absence of furniture in the house? By analogy, it would seem so under the *Haggard* standard. It is clear that the likelihood of any meaningful judicial review of 9-15-14 awards is remote at best. Such absolute discretion without the likelihood of judicial review smacks of government under men, rather than government under law.

The availability or non-availability of a prompt opportunity for complete judicial review is to be considered in determining the extent of the procedural safeguards at the due process hearing. The lesser the availability for

complete judicial review, the greater or more extensive the procedural safeguards required at the hearing. *Brock, Secretary of Labor v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1986). See also *Norman v. State*, 171 Ga. 527, 530 (3) (1930), citing *Arrowsmith v. Harmoning*, 118 U.S. 194, 6 S. Ct. 1023 and *In re Converse*, 137 U.S. 624, 11 S. Ct. "When a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accordance with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Bundy v. Wilson*, 815 F.2d 125 (1st Cir. 1987), quoting from *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceeding is governed by constitutionally defective evidentiary standards. *Santosky v. Kramer*, 455 U.S. 745, 757 (1982).

Given the "chilling effect" of this statute, it is clear that a "bright line" test or standard is necessary. But to do so, the Hydra must be slain. As discussed below, this is particularly true where the 9-15-14 respondent is an attorney whose ability to defend himself is hindered by the attorney-client privilege and his duty owed to the client or former client.

It is clear that Dixon was denied due process. While due process and equal protection are frequently interchangeable, that is not always the case. It is possible for a hearing to meet minimum due process standards, yet fail to meet equal protection requirements. For example, the balancing tests described above may reveal that, under the circumstances of a particular case, due process standards were met. However, if the state has classified the litigants so that they receive materially fewer safeguards than are generally afforded others similarly circumstanced, then the statute would still fail as denying equal protection under the 14th Amendment. While Dixon advances the view that the "hearing" afforded him denied him due process, even should this Court determine that due

process requirements were satisfied, it is clear that equal protection was denied.

C. Equal Protection.

1. *Arbitrary Classification Prohibited.*

"The guaranty of equal protection of the law requires that all persons shall be treated alike under like circumstances and conditions, both in privileges conferred and in liabilities imposed." *Chatterton v. Dutton*, 223 Ga. 243 (1967) cert. den. 389 U.S. 914, 88 S. Ct. 247 (1967), citing *Lowe v. Kansas*, 163 U.S. 81, 16 S. Ct. 1031. Retrospective case-by-case review cannot preserve fundamental fairness when a class of proceeding is governed by constitutionally defective evidentiary standards. *Santosky v. Kramer*, 455 U.S. 745, 757 (1982). "The requirements of the 14th Amendment are satisfied if trial is had according to the settled course of judicial procedure obtaining in the particular State, and the laws operate on all persons alike and do not subject the individual to the arbitrary exercise of the powers of government." *Minder v. Georgia*, 183 U.S. 559, 562, 22 S. Ct. 224 (1901), quoted by the Georgia Supreme Court in *Chatterton v. Dutton, supra.*

Simply stated, "where laws are applied differently to different persons under the same or similar circumstances, equal protection of law is denied." *Hughes v. Reynolds*, 223 Ga. 727, 730 (1967). While it is clear that the legislatures may classify and may legislate with respect to each classification, the power to classify for purposes of legislation is limited. "The classification must be natural and not arbitrary. It must have a reasonable relation to the subject matter of the legislation, and must furnish some legitimate ground for differentiation." *The Ledger-Inquirer Co. v. Brown*, 213 Ga. 538, 540 (1957).

The "settled course of judicial procedure obtaining in" Georgia is that a party seeking relief sues or moves against the opposing or responding party, who then has an opportunity after notice to prepare and file responsive

pleadings, to conduct discovery, to demand as a matter of right a pretrial conference and the issuance of a pretrial order under O.C.G.A. Section 9-11-16, to have a full trial (and in most instances the right to demand a trial by jury) at which the respondent has an opportunity to present witnesses of his own, to testify in his own behalf (especially regarding documents admitted into evidence and about which his adversary has testified), and to confront and cross-examine witnesses testifying or submitting evidence adverse to the respondent. Then, in the event of an adverse judgment, the dissatisfied litigant has the right to a direct appeal. All of these elements in the "settled course of judicial procedure" are absent in this case, and in 9-15-14 cases in general. In fact, 9-15-14 respondents are the only litigants in Georgia who can suffer an adverse money judgment in excess of $2,500 without having a right to direct appeal. O.C.G.A. 5-6-35.

Though there are some similarities, Section 9-15-14 should be distinguished from Fed. Civ. P. 11. Georgia has its own Rule 11 in its Civil Practice Act (O.C.G.A. Section 9-11-11). Section 9-15-14 is far more pervasive than is Rule 11. While Rule 11 awards "shift only the cost of a discrete event rather than the litigation's entire cost," (*Business Guidelines, Inc. v. Chromatic Communications Enterprises, Inc.*, —— U.S. ——, Docket no. 89-1500, decided February 26, 1991, *affirming* 892 F.2d 802), 9-15-14 shifts the entire cost of the litigation. Attorneys fees and litigation expenses awarded under 9-15-14 are to be compensatory damages. *Ferguson, supra*, at 440. Therefore, there is no rational basis or legitimate purpose to arbitrarily classify 9-15-14 respondents in such a manner as to deny them the normal procedural safeguards afforded other civil litigants against whom compensatory money damages are sought. In this case, 9-15-14 shifted the entire cost of the litigation. Indeed, Hubert has sought the imposition of additional attorneys fees (in an amount described as "tens of thousands of dollars") in respect to this appeal. Though the Georgia Supreme Court denied such motion addressed to it, it did so without prej-

udice to Hubert's right to seek such additional assessment in the trial court upon remittitur (4a). While compensatory by design, 9-15-14 has become punitive in effect because of vagueness and the lack of procedural safeguards.

However, even were it to be determined that abusive litigation respondents should be classified in such a manner as to be treated differently than are civil litigants responding to other claims for compensatory money damages, there is still no rational, legitimate or constitutional basis for classifying abusive litigation respondents under Section 9-15-14 differently from abusive litigation respondents under 51-7-80 *et seq.*

2. *Three Standards of Analysis.*

In analyzing whether a law is constitutional under the equal protection provisions of both the U.S. and State Constitutions, there are three standards generally accepted, (i) the strict judicial scrutiny test, (ii) the intermediate level of scrutiny and (iii) the rational relationship test. *McDaniel v. Thomas*, 248 Ga. 632, 638 (1981).

The strict judicial scrutiny standard applies if the classification either operates to the disadvantage of a suspect class or interferes with the exercise of a fundamental right. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 93 S. Ct. 1278 (1973). Procedural due process is a fundamental constitutional right so essential that its infringement merits strict or careful scrutiny by the Courts. *Ambles v. State*, 259 Ga. 406 (1989) (citing Rotunda, Nowak & Young, *Treatise on Constitutional Law Substance and Procedure*, Section 15.4, (1986). Under the strict judicial scrutiny standard, the classification will fall unless the government demonstrates that the classification is necessarily related to a compelling governmental objective. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973); *Graham v. Richardson*, 403 U.S. 365 (1971); *McDaniel v. Thomas*, 248 Ga. at 639 (1981).

The intermediate level of judicial scrutiny requires that a classification be substantially related to an important governmental objective. *Craig v. Boren*, 429 U.S. 190 (1976); *McDaniel v. Thomas*, *supra*, at 639.

The rational relationship test provides that a statutory classification is presumed valid so long as it bears a reasonable relationship to a legitimate governmental purpose. See *Williamson v. Lee Optical*, 348 U.S. 483, 75 S. Ct. 461 (1955).

(a) *Strict Scrutiny.* Petitioner urges this Court to apply the strict scrutiny standard to this case because 9-15-14 involves the denial of fundamental due process rights. Therefore, the government would have the burden of showing that the classification of 9-15-14 respondents so as to deny them the fundamental due process rights afforded other civil litigants in this state, is necessarily related to a compelling governmental objective. *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973). This means that the classification is not entitled to the usual presumption of validity, and that the state bears the burden of proving that the classification system "has been structured with precision and is tailored narrowly to serve legitimate objectives and that it has selected the less drastic means for effectuating its objectives." *San Antonio School District v. Rodriguez*, *supra*, at 16-17. It is difficult to imagine any possible compelling state interest to encourage abusive litigation claims or to favor the complainants over the respondents, nor is there any compelling state interest to be subserved by summary adjudication in such cases, as opposed to going through the normal process afforded under 51-7-80 *et seq.* Certainly, this classification cannot be considered "necessarily" related to any such governmental objective. There is nothing to remotely suggest that there was any effort to structure 9-15-14 with "precision," nor to see that it was "tailored narrowly" to serve legitimate objectives. In fact, by eliminating virtually all procedural safeguards, the legislature selected the most "drastic means," rather

than the less drastic means for effectuating its objectives, whatever they might be.

This becomes even more apparent when viewed in light of the further classification among abusive litigation respondents. If the complaining party claims to have been damaged for expenses of litigation plus other damages, that complaining party, in his sole discretion, can elect to proceed under 51-7-80 (with all of its attendant procedural safeguards) or 9-15-14 (with no procedural safeguards) or *both*. No such option is available to the responding party. The availability or non-availability of procedural safeguards for the respondent is completely at the discretion of his adversary. In this case Hubert claimed damages in addition to litigation expenses, so both statutes were available to and used by him. He pursued 9-15-14 against Dixon because he felt he had a sympathetic judge and because he wanted to eliminate Dixon's "good faith" defense.

Also, 51-7-82(b) (Appendix K at 26a) provides that good faith is a "complete defense" to an abusive litigation claim under 51-7-80. There is no such defense under 9-15-14. Th trial judge ruled from the bench that Dixon's good faith was immaterial. Hubert knew Dixon acted in good faith, and that Dixon would likely prevail on that issue. Under the unconstitutional scheme of abusive litigation statutes in Georgia, Hubert was allowed to avoid Dixon's "good faith" defense simply by unilaterally opting to proceed under 9-15-14.

The complaining party can proceed under both statutes, and if, during the process of his claims, it appears that his chances will be better before a jury, he can drop the 9-15-14 claim and proceed only under the 51-7-80 claim. Likewise, if he feels that he has a favorable judge, he can drop the other claim, and proceed under 9-15-14. This encourages forum shopping and increases the likelihood of biased adjudications. If he feels the responding party has a strong good faith defense, the complainant can eliminate it by electing to proceed under 9-15-14.

(b) *Intermediate Level of scrutiny.* Likewise, the statutory scheme for abusive litigation has no substantial relationship to any important governmental objective. There is no important governmental objective in treating abusive litigation litigants differently. Even if there were, denying procedural due process cannot be said to have any substantial relationship thereto, nor can there be such a substantial reason to deny arbitrarily the good faith defense to some litigants and afford it to others.

(c) *Rational Relationship Test.* Even should the Court apply the least stringent "rational relationship" test, the statute still fails. Under this test, the classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having *a fair and substantial relation* to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76, 92 S. Ct. 251 (1971), quoted in *Clark v. Singer*, 250 Ga. 470, 472 (1983).

Abusive litigation respondents are clearly "persons similarly circumstanced." By definition, such respondents are persons who are accused of pursuing litigation which the complaining party claims lacks justiciable issues or substantial justification. There is no rational or reasonable basis for treating some differently than others. Under *Reed*, *supra*, they are to "be treated alike." Here the disparity in their treatment is stunning.

What possible "fair and substantial relation to the object of the legislation" is there for providing for a jury trial for one, but denying any sort of trial to the other? Or for allowing one the standard procedural rights of discovery, pretrial conference and order, motion practice to fine tune the issues, etc., while denying all such rights to the other? Why should one set of abusive litigation respondents be given a direct right of appeal, but the other set be denied such right? What possible reason could there be to expressly make good faith a "complete defense" to one and deny such substantive defense to the other? There is simply no rational basis for such arbitrary classification. There is no difference between the

abusive litigation respondents, and there is certainly no reason to give all of the options to the complaining party. That is tantamount to shifting the burden of proof to the respondent.

This is especially true where the 9-15-14 respondent is an attorney. Throughout the representation in the underlying case, the complaining party's attorney can use the discovery process and other procedural safeguards to further his client's claims against not only the opposing party, but the opposing party's counsel. The opposing attorney on the other hand, is duty bound to protect *only* his client's interests, not his own. Then, by filing a 9-15-14 motion, the complaining party accomplishes two goals. One, he disrupts the opposing camp by creating the conflict of interest between opposing party and the opposing party's counsel, thereby effectively damaging his opposing party's ability to litigate effectively. He confronts opposing counsel with the spectre of a summary adjudication without discovery or any preparation, and this is exacerbated by the fact that opposing counsel is precluded from defending or representing himself so long as his primary duty is owed to the client. Thereafter, his ability to effectively defend himself remains hindered by the continuing duty owed under the attorney-client relationship. The more elaborate safeguards available under 51-7-80 would greatly reduce this unfair consequence. Not only does 9-15-14 arbitrarily discriminate against respondents in general, it is even more discriminatory against attorney respondents.

Accordingly, 9-15-14 is unconstitutional in that it violates equal protection rights under the 14th Amendment of the United States Constitution.

II. POLICY CONSIDERATIONS SUPPORTING THE CONSTITUTIONAL REASONS.

A. O.C.G.A. Section 9-15-14 Hinders Access to the Courts.

1. *"Chilling Effect."*

The vagueness of the statute, its dearth of any procedural safeguards, and the lack of any right to direct ap-

peal causes 9-15-14 to have an extraordinary "chilling effect" on attorneys' willingness to represent unpopular clients or causes, or to handle cases involving unsettled areas of law. See *Guernsey Petroleum Corp. v. Data General Corp.*, 183 Ga. App. 790, 796 (1987). This is especially true in light of the pervasiveness of 9-15-14 awards. Once a lack of justiciability or a lack of substantial justification is shown, the responding party is then opened up to the entire costs of the litigation, including the costs incurred asserting the 9-15-14 claim itself—all this, without any constitutional safeguards. The "*in terrorem*" effect of the statute and its current application, is enormous. Its pernicious effect on our system cannot be ignored any longer. In the case *sub judice*, the attorneys fees assessed against Petitioner Dixon included all litigation expenses incurred in defending against the plaintiffs' claims in the underlying case, all litigation expenses incurred in asserting the 9-15-14 motion against plaintiffs, all litigation expenses incurred in asserting the 9-15-14 motion against plaintiffs' attorney (Dixon), and all litigation expenses incurred in responding to Dixon's constitutional attacks on the statute. Furthermore, Hubert has sought (and has obtained tacit leave of the Georgia Supreme Court to again seek same in the trial court upon remittitur) to recover yet more expenses of litigation (in an amount Hubert has described as "tens of thousands of dollars") with respect to Dixon's appeals. That means Dixon would be confronted with the spectre of $100,000.00 in liability for a case he voluntarily dismissed *before* the close of discovery, and which he had attempted to dismiss for months before (but could not obtain permission from his client to do so). Confronted with such potential liability, only the most foolhardy attorney would be willing to accept cases where the client or cause is unpopular. As Justice Benham, then Judge Benham, observed in his dissenting/concurring opinion in *Ferguson v. City of Doraville*, 186 Ga. App. 430 (1980) at 438-439, had 9-15-14 existed in times past, we would still be living with such concepts as "separate but equal."

The problem also exists where the cause of action involves unsettled areas of law, such as the plaintiffs' claims involved in the underlying case here. The plaintiffs' complaint sounded in tort for defamation, invasion of privacy and tortious interference. In conjunction with these claims the issue of privilege arose. None of these areas of law is well settled. "The law of defamation is dripping with contradictions and confusion and is vivid testimony to the sometimes perverse ingenuity of the legal mind." Smolla, *A New Analytic Primer on the Future Course of Defamation*, 75 Georgetown L.J. 1519 (1987). It is not surprising that defamation law is in a state of confusion and unsettled, because of the many conflicting interests (*e.g.*, free speech, free press, privacy rights, reputational injury, etc.). These complex issues are then further complicated by such concepts as "publication" and "privilege." Indeed, the rule seized upon by the trial court in this case to conclude that there was no publication has been described as a "legal fiction," since it is a judicially created exception to the literal statutory definition. See *Kurtz v. Williams*, 188 Ga. App. 14 (1988), which narrowed the scope of such "legal fiction" to a far more restricted meaning than applied by the trial court in this case. There are varying concepts of what constitutes "privilege," both in the area of the attorney-client relationship and defamation law. In Georgia, the attorney-client privilege does not apply to "business advice" given by the attorney. *Southern Guaranty Insurance Co. v. Ash*, 192 Ga. App. 24 (1989); *Upjohn v. U.S.*, 449 U.S. 383, 393 101 S.Ct. 677. Since the "advice" given by Hubert to his client involved recommendations on how to achieve goals for which there was no legal right or remedy, it would seem that such advice would be "business advice" rather than "legal advice." In two places the Hubert letter urges that its contents be discussed with others who are not clients of Hubert, and he admittedly contemplated that the letter would be delivered to non-clients (which it, in fact, was) (43a). That would take the letter outside the attorney-client privilege. In any event, Hubert did not

even claim privilege for his publication of the Strategies & Tactics Memo to Jack Gray. The original publisher is accountable for foreseeable re-publication. *Colonial Stores, Inc. v. Barrett*, 73 Ga. App. 839, 840 (1946). It should be noted that the Georgia Constitution emphasizes accountability for abuse of free speech rights by providing "Every person may speak, write and publish sentiments on all subjects but shall be responsible for the abuse of that liberty." Ga. Const. (1983), Art. I, Sec. 1, Par. 5. Therefore, in Georgia, defamation law should be construed in light of this constitutional accountability for abuse of free speech.

Similarly, the law of invasion of privacy rights in Georgia has been held to be "woefully undeveloped." *Pierson v. News Group Publications, Inc.*, 549 F. Supp. 635 (S.D. Ga. 1982).

2. *Increased Cost and Risk of Litigation.*

9-15-14 claims and threats of such claims have become an all too frequent litigation tactic in Georgia. Once asserted or threatened, such claims promote acrimony and expand the scope of the litigation. They serve not only to make the litigation more risky for the opposing party, and to disrupt the opposing "camp," but they also necessarily make the litigation more expensive. This is true because once such a claim is threatened or received, the receiving counsel must then explain at length the existing or potential conflict of interest, and may even need to recommend that the client consult with other counsel on the conflict issue. Abusive litigation claims are increasingly becoming the "tail that wags the dog." See *Ferguson v. City of Doraville, supra.* Such was the case here, where the abusive litigation claims asserted by Hubert dwarfed the underlying claim, and beginning with the very first deposition, the primary emphasis of the case was on the abusive litigation claims. This clearly gives the wealthy yet another weapon to use against those who cannot afford such mushrooming litigation expenses.

B. O.C.G.A. Section 9-15-14 Causes Unreasonable Interference With the Attorney-Client Relationships in Pending Litigation.

1. *Improper Litigation Tactics.*

The vagueness of 9-15-14, when coupled with its lack of any constitutional safeguards, encourages abuse of abusive litigation claims as a litigation weapon or tactic to "divide and conquer" the opposition. This is frequently a consequence even when not intended by the complaining party. Where litigation involves serious allegations or acrimony from any other cause, the "heat of battle" influences litigants to use whatever tools or weapons are available to them. This consequence is avoided in 51-7-80 cases, which requires a favorable adjudication in the underlying claim before commencement of the abusive litigation claim. This lets the parties litigate the main claim without the disruption from abusive litigation claims, and without the acrimony which naturally flows from abusive litigation claims. It also affords the litigants a "cooling off period" after the main case is adjudicated, so that "clearer heads" might prevail.

2. *Distinguished from Rule 11.*

Again, because of the pervasiveness of 9-15-14 (as distinguished from the application to a "discrete event" in Rule 11 cases), it is almost impossible to prevent a 9-15-14 claim from dwarfing the main subs antive claims. See discussion in I(B)(2)(a) at page 9 above.

C. O.C.G.A. Section 9-15-14 Causes Unintended Reversal of Long Held Policy.

9-15-14 is especially problematic in cases where the underlying claims arise from defamation. As in most jurisdictions, Georgia has long had a public policy of protecting by privilege statements contained in formal pleadings filed in judicial proceedings. O.C.G.A. Section 51-5-8; *Fedderwitz v. Lamb*, 195 Ga. 691 (1943). Such policy affords greater immunity and protections for statements made in formal pleadings filed in pending lawsuits

than to mere extra-judicial statements. The current application of 9-15-14 where the abusive litigation claims arise from defamation cases effectively reverses this policy by giving more protection to extra-judicial communications than to judicial pleadings. While extra-judicial dispute resolution is to be encouraged, it is not to be accomplished by giving greater protection to extra-judicial comments than to *in judicio* communications. The traditional policy is necessary to encourage and facilitate the search for truth in judicial proceedings. 9-15-14 hinders such search, and encourages obstructive actions. Another reason for the long standing policy of protecting *in judicio* communications, is that communications made within the confines of judicial proceedings necessarily afford the other party an opportunity to confront and cross examine the persons making those statements, and thereby temper the irresponsible use of such communications. No such opportunity exists with respect to extra-judicial communications. Therefore, such favoring of extra-judicial communications encourages less responsible communications because of the unwarranted decrease in accountability for such communications.

CONCLUSION

"The touchstone of due process is protection of the individual against arbitrary action of government." *Daniels v. Williams*, 474 U.S. 327, 331 (1986), quoting *Dent v. West Virginia*, 129 U.S. 114, 123 (1889). Georgia's system of adjudicating abusive litigation claims is not rational. It is therefore respectfully requested that the Petitioner be granted the Writ of Certiorari.

Respectfully submitted,

TYLER C. DIXON, *Pro Se*
RAIFORD, DIXON & THACKSTON
120 Allen Road
Atlanta, Georgia 30328
(404) 847-0860

APPENDICES

APPENDICES

APPENDIX A

SUPREME COURT OF GEORGIA
ATLANTA

February 04, 1991

Case No. S90A1632

TYLER DIXON

v.

RICHARD N. HUBERT, *et al.*

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Joline B. Williams
JOLINE B. WILLIAMS
Clerk

APPENDIX B

SUPREME COURT OF GEORGIA
ATLANTA

[Feb. 4, 1991]

S90A1632

TYLER DIXON

v.

RICHARD N. HUBERT, *et al.*

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

By: Bell, J.

The following direction was given:

Upon consideration of the motion for a stay of this court's remittitur in order that an appeal or an application for certiorari may be filed in the Supreme Court of the United States to obtain a review of this court's judgment rendered in this case on February 4, 1991, such motion is hereby granted, subject to the following conditions:

(1) The clerk of this court is directed to withhold the transmittal of such remittitur to the trial court for ninety days from the date of this court's judgment.

(2) The clerk of this court is directed to transmit such remittitur to the trial court not later than the ninety-fifth day from the date of this court's judgment, pro-

vided that the clerk shall continue to withhold the transmittal of such remittitur if the clerk is notified in writing that an appeal or application for certiorari has been timely filed in the Supreme Court of the United States. Upon the timely filing of such appeal or application in the Supreme Court of the United States, the clerk is directed to withhold the transmittal of such remittitur until the final disposition of the case by that court.

/s/ Richard Bell
JUSTICE RICHARD BELL

APPENDIX C

SUPREME COURT OF GEORGIA
ATLANTA

[Feb. 4, 1991]

S90A1632

TYLER DIXON

v.

RICHARD N. HUBERT *et al.*

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

The motion of appellees to include in the remittitur direction to the trial court is hereby denied, without prejudice to any efforts by appellees upon remittitur to obtain an order from the trial court awarding them attorney fees they incurred with respect to this appeal.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Hogg, Deputy
Clerk

APPENDIX D

IN THE SUPREME COURT OF GEORGIA

Decided: Jan. 10, 1991

S90A1632

DIXON

v.

HUBERT *et al.*

Judgment affirmed without opinion pursuant to Rule 59. All the Justices concur.

APPENDIX E

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File No. D-61506

ALEXANDER H. LOSTOCCO, *et al.*,
Plaintiffs,

v.

S. ALAN AYCOCK, *et al.*,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In support of its December 18, 1989 Order, the Court issues the following findings of fact and conclusions of law.

Findings of Fact

1.

Plaintiff Alexander H. Lostocco was the controlling shareholder of Plaintiff Jinna Management, Inc. ("Jinna").

2.

Jinna was the managing partner in Airport Parking Venture I ("APVI"), a general partnership that operated a business known as "the Carport."

3.

Alan Aycock was a partner in Tripoint Holdings, Ltd. ("Tripoint").

4.

Tripoint was a partner in APVI.

5.

Richard Felker and Ronald Cates were also partners in APVI

6.

When The Carport began to lose approximately $1 million a year, Mr. Aycock, on behalf of himself and Tripoint, consulted Defendant Richard N. Hubert for advice about protecting his investment.

7.

Mr. Hubert is an attorney and a partner in Defendant Chamberlain, Hrdlicka, White, Johnson & Williams ("CHWJW").

8.

Mr. Hubert conducted a preliminary investigation, which included taking sworn statements from two former employees of The Carport and speaking with John Gray, an attorney who represented a third former employee.

9.

Mr. Hubert then wrote a letter to Mr. Aycock, his client, dated August 22, 1988, in which he recited some of the relevant facts and gave certain advice to Mr. Aycock.

10.

Mr. Hubert did not give the letter to anyone other than Mr. Aycock.

11.

After receiving the letter, Mr. Aycock consulted with his Partner in APVI, Mr. Felker, and, on Mr. Felker's request, gave Mr. Felker a copy of the August 22 letter from Mr. Hubert.

12.

Mr. Aycock neither asked for nor received permission from Mr. Hubert to give the letter to Mr. Felker.

13.

As a result of the concerns Mr. Aycock expressed to him, Mr. Felker retained Coopers & Lybrand, an accounting firm, to conduct an audit of The Carport.

14.

Based in part on the audit of Coopers & Lybrand and information given him by Mr. Cates, Mr. Felker asked Mr. Lostocco for the resignation of Jinna as managing partner of The Carport.

15.

The Complaint in this action, filed soon after Jinna's resignation, sought damages from Mr. Hubert and his law firm, CHWJW, for defamation, invasion of privacy, and interference with business relations.

16.

The defamation claim was predicated upon the contents of the August 22 letter written by Mr. Hubert to his client, Mr. Aycock.

17.

Mr. Dixon, Mr. Lostocco's attorney, had no reason to believe that Mr. Hubert had sent or given the letter to anyone other than Mr. Aycock.

18.

The invasion of privacy claim was predicated upon the fact that someone sent through the mail to Mr. Lostocco's wife an article that had appeared in The Atlanta Business Chronicle. That article reported, truthfully, that Mr. Lostocco had been named as a defendant in a lawsuit alleging sexual harassment.

19.

Mr. Dixon had no reason to believe that Mr. Hubert had any involvement in sending the article to Mr. Lostocco's wife.

20.

The claim for interference with business relations was predicated upon the August 22 letter and the fact that Richard Felker asked that Jinna resign as managing partner of The Carport.

21.

The Complaint also accused Mr. Hubert of acting with malice toward Mr. Lostocco and of threatening criminal prosecution in order to gain an advantage in a civil matter.

22.

There was no basis in fact for any of these allegations.

23.

In addition to Mr. Lostocco, the Plaintiffs included Jinna and Professional Auto Care, Inc. ("PACI").

24.

There was no factual basis for claims against Mr. Hubert by either of these corporations.

25.

At the deposition of Mr. Lostocco, and on a number of occasions throughout the litigation, Mr. Dixon was warned by opposing counsel that the lawsuit, as against Mr. Hubert and his law firm, was frivolous and that if it were not dismissed, Mr. Dixon would be putting himself personally at risk.

26.

In spite of these warnings, Mr. Dixon continued the lawsuit against Mr. Hubert and Mr. Hubert's law firm

for a period of approximately nine months before dismissing the lawsuit.

27.

Mr. Hubert and his law firm incurred attorney's fees and expenses in connection with defending the case and in pursuing the attorney's fee claim of more than $65,000.00.

28.

Some of the fees and expenses were incurred in connection with a *Yost v. Torok* counterclaim. The sum of $59,480.84 was reasonably incurred as expenses and attorney's fees in connection with the defense of the case and the claim for attorney's fees.

Conclusions of Law

1.

In view of Mr. Dixon's failure to articulate any basis for the claims against Mr. Hubert and CHWJW by Jinna and PACI, there was a complete absence of any justiciable issue of law or fact with respect to those claims, and an award of attorney's fees is required under O.C.G.A. § 9-15-14(a).

2.

Even if it could not be said that the claims against Mr. Hubert and CHWJW by Jinna and PACI reflected a complete absence of any justiciable issue of law or fact, an award of attorney's fees is nonetheless appropriate under O.C.G.A. § 9-15-14(b) because those claims lacked substantial justification.

3.

Because there was no evidence that Mr. Hubert provided the August 22 letter to anyone other than his client, there was a complete absence of any justiciable issue of law or fact with respect to Mr. Lostocco's defamation claim against Mr. Hubert and CHWJW, and an award of attorney's fees is required under O.C.G.A. § 9-15-14(a). Georgia Code Section 51-5-1(b) provides

that "publication of the libelous matter is essential to recovery." Material is not published under Georgia law if it is provided only to those "who are priviliged to communicate or receive the information." *Monohan v. Sims*, 163 Ga. App. 354, 358, 294 S.E.2d 548 (1982) (citing *Garrett v. Lockheed Aircraft Corp.*, 98 Ga. App. 443, 446, 106 S.E.2d 333 91958)). As a client of Mr. Hubert and CHWJW, Mr. Aycock was privileged to receive the information in the August 22 letter.

4.

In filing a defamation claim on Mr. Lostocco's behalf, Mr. Dixon had the benefit of not only these general principles of publication but also of a case with very similar facts. In *Carter v. Willowrun Condominium Ass'n*, 179 Ga. App. 257, 345 S.E.2d 924 (1986), the plaintiff, a lessee of a condominium, sued the condominium association's attorney for allegedly defaming him in a letter written to the lessor of the condominium. The Court of Appeals held that there was no publication because the communication was "made only to one who had reason to receive the information which concerned her . . . property and income." *Id.* at 258. As in *Carter*, the client here had reason to receive information concerning his partnership interest.

5.

Mr. Dixon's insistence that Mr. Hubert's statement in the letter—"I would invite you to discuss this with your partners"—constitutes evidence of Mr. Hubert's intent that his client publish the letter does not lend any validity to the defamation claim. As a factual matter, inviting one to discuss the subject matter of a letter is not equivalent to inviting one to distribute the letter. Moreover, even if Mr. Hubert had invited Mr. Aycock to distribute the letter to his partners, there would still be no publication or intent to publish because the partners to whom the letter would be distributed were themselves privileged

to receive information concerning the management of their partnership.

6.

There was a complete absence of any justiciable issue of law or fact with respect to Mr. Lostocco's defamation claim for the further reason that Mr. Hubert's letter to his client was privileged and there was no evidence of malice. If an allegedly defamatory statement is made under privileged circumstances, then the plaintiff must show that the defendant acted with malice in fact. *Land v. Delta Airlines*, 147 Ga. App. 738, 738, 250 S.E.2d 188 (1978); *Atlanta Journal Co. v. Doyal*, 82 Ga. App. 321, 328, 60 S.E.2d 802 (1950).

7.

Mr. Hubert's letter to his client was, at the very least, conditionally privileged. Under Georgia Code section 51-5-7, a communication is conditionally privileged if it is (1) "made in good faith in the performance of a legal or moral private duty," (2) "made with a good faith intent on the part of the speaker to protect his interest in a matter in which it is concerned," or (3) a "comment[ ] of counsel, fairly made, on the circumstances of a case in which he is involved and on the conduct of the parties in connection therewith." O.C.G.A. § 51-5-7(2), (3), (6). Mr. Hubert's letter falls squarely under all three of these privileges. He was performing his legal, contractual duty to his client. *Id.* § 51-5-7(2); *see Cochran v. Sears, Roebuck & Co.*, 72 Ga. App. 458, 462, 34 S.E.2d 296 (1945) (statements made by one employee about another to employer and social worker were privileged under subsection (2)). He made the statements in the letter in an effort to protect his client's interest, which the law allows him to treat as his own. O.C.G.A. § 51-5-7(3)); *see Layfield v. Turner Advertising Co.*, 181 Ga. App. 824, 826, 354 S.E.2d 14 (1987) (attorney's letter to *third party* privileged); *Sherwood v. Boshears*, 157 Ga. App. 542, 544, 278 S.E.2d 124 (1981) (same). And the letter con-

sisted of comments on the circumstances of anticipated litigation. O.C.G.A. § 51-5-7(6).

8.

In light of the conditional privileges applicable to Mr. Hubert's letter, Mr. Dixon would have needed evidence of malice in fact to justify bringing Mr. Lostocco's defamation claim. No such evidence was available. Mr. Lostocco testified at his deposition that he had no reason to suppose that Mr. Hubert bore any personal malice toward him or that Mr. Hubert was doing anything but giving his client advice. In addition, Mr. Dixon knew or should have known that Mr. Lostocco and Mr. Hubert had never met.

9.

Even if it could not be said that Mr. Lostocco's defamation claims against Mr. Hubert and CHWJW reflected a complete absence of any justiciable issue of law or fact, an award of attorney's fees is nonetheless appropriate under O.C.G.A. § 9-15-14(b) because the claims lacked substantial justification, as described above in paragraphs 3-8.

10.

Because there was no evidence that Mr. Hubert and CHWJW played any role in sending a copy of the *Atlanta Business Chronicle* article to Mr. Lostocco's wife, there was a complete absence of any justiciable issue of law or fact with respect to Mr. Lostocco's invasion of privacy claim against Mr. Hubert and CHWJW, and an award of attorney's fees is required under O.C.G.A. § 9-15-14(a).

11.

Even if it could not be said that Mr. Lostocco's invasion of privacy claims against Mr. Hubert and CHWJW reflected a complete absence of any justiciable issue of law or fact, an award of attorneys' fees is nonetheless appro-

priate under O.C.G.A. § 9-15-14(b), because the claims lacked substantial justification.

12.

Because Mr. Hubert exercised an "absolute right" in writing his client, there was a complete absence of any justiciable issue of law or fact with respect to Mr. Lostocco's interference with business relations claim against Mr. Hubert and CHWJW, and an award of attorney's fees is required under O.C.G.A. § 9-15-14(a). A plaintiff cannot recover for "an act which a man has a definite legal right to do without any qualification." *Campbell v. Carroll*, 121 Ga. App. 497, 499, 174 S.E.2d 375 (1970), *aff'd*, 226 Ga. 700, 177 S.E.2d 83 (1970). Inasmuch as the courts have developed an entire body of privilege law in an effort to ensure absolute confidentiality between attorney and client, it is clear that Mr. Hubert acted in the exercise of an absolute right in writing to inform his client of mismanagement.

13.

There was a complete absence of any justiciable issue of law or fact with respect to Mr. Lostocco's interference with business relations claim for the further reasons that Mr. Hubert's letter to his client was privileged and there was no evidence of malice. If a defendant acts under a qualified privilege in interfering, a plaintiff complaining of tortious interference must show that the defendant acted with malice in fact. *Johnson v. Auto/Mend, Inc.*, 183 Ga. App. 311, 312, 359 S.E.2d 10 (1987). Acts undertaken to comply with a fiduciary duty, such as the letter written by Mr. Hubert here, are covered by a qualified privilege. *See Stamps v. Ford Motor Co.*, 650 F. Supp. 390, 406 (N.D. Ga. 1986) (applying Georgia law). Mr. Dixon had no evidence of malice to overcome the privilege and thus was not justified in bringing Mr. Lostocco's tortious intereference claim.

14.

Even if it could not be said that Mr. Lostocco's interference with business relations claims against Mr. Hubert and CHWJW reflected a complete absence of any justiciable issue of law or fact, an award of attorney's fees is nonetheless appropriate under O.C.G.A. § 9-15-14(b) because the claims lacked substantial justification, as described above in paragraphs 12-14.

15.

Mr. Dixon cannot claim that the case represented a good-faith attempt to establish a new theory of law in Georgia because he simply did not have the facts to support the theories he has espoused or any persuasive authority to create a cause of action out of the facts he did have.

16.

An award of attorney's fees against Mr. Dixon as Mr. Lostocco's attorney is just given the absence of any evidence to indicate that Mr. Lostocco misled Mr. Dixon in any way.

17.

Under *Vogtle v. Coleman*, 259 Ga. 115, 119, 376 S.E.2d 861 (1989),, any attorney's fees incurred for pursuing Mr. Hubert's *Yost v. Torok* claim may be recovered in the *Yost* proceeding itself. By analogy to *Vogtle*, however, Mr. Hubert is entitled to recover the fees he has incurred in pursuing the motion for attorney's fees considered herein.

This 25th day of April 1990.

/s/ Luther Alverson
LUTHER ALVERSON
Judge, Superior Court of
Fulton County, Atlanta
Judicial Circuit

APPENDIX F

SUPREME COURT OF GEORGIA
ATLANTA

March 28, 1990

Case No. S90C0691

TYLER C. DIXON

v.

RICHARD N. HUBERT, *et al.*

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Joline B. Williams
Clerk

APPENDIX G

SUPREME COURT OF GEORGIA
ATLANTA

[Mar. 8, 1990]

S90C0691

TYLER C. DIXON

v.

RICHARD N. HUBERT, *et al.*

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

Having considered the application for certiorari in this case, the court grants the writ of certiorari and reverses the Court of Appeals' denial of the application for appeal. Further, the court remands the case to the Superior Court of Fulton County for findings of fact in the award of attorney fees in accordance with *Market Insurance Corp. v. IHM, Inc.*, 192 Ga.App. 441 (1989).

SUPREME COURT OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court affixed the day and year last above written.

/s/ Lynn M. Hogg
Deputy Clerk

APPENDIX H

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, February 08, 1990

Application No. #A90D0019

TYLER C. DIXON

v.

RICHARD N. HUBERT, *et al.*

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

COURT OF APPEALS OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

Feb. 08, 1990

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin
Clerk

APPENDIX I

COURT OF APPEALS
OF THE STATE OF GEORGIA

Atlanta, February 02 1990

Application No. A90D0019

TYLER C. DIXON
v.
RICHARD N. HUBERT, *et al.*

The Honorable Court of Appeals met pursuant to adjournment.

The following order was passed:

Upon consideration of the Application for a Discretionary Appeal, it is ordered that it be hereby DENIED.

COURT OF APPEALS OF THE STATE OF GEORGIA
CLERK'S OFFICE, ATLANTA

Feb. 02, 1990

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Victoria McLaughlin
Clerk

APPENDIX J

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File Number D-61506

ALEXANDER H. LOSTOCCO, *et al.*,
Plaintiffs

v.

S. ALAN AYCOCK, *et al.*,
Defendants

JUDGMENT AND ORDER

[Filed Dec. 19, 1989]

This matter having come before the Court for a full evidentiary hearing on Defendant Richard N. Hubert's and Defendant Chamberlain, Hrdlicka, White, Johnson and Williams' Motion for an Award of Fees Under O.C.G.A. 9-15-14 against Tyler Dixon, former counsel for Plaintiffs, and the Court sitting without a jury having heard evidence and argument of counsel, and having considered all appropriate materials,

IT IS HEREBY CONSIDERED, ORDERED AND ADJUDGED that the Movants Richard N. Hubert and Chamberlain, Hrdlicka, White, Johnson and Williams shall recover from Tyler Dixon the sum of fifty-nine thousand, four hundred and eighty dollars and eighty-four cents, ($59,480.84) as reimbursement for their attorneys fees in this case, all pursuant to O.C.G.A. 9-15-14. In its consideration of the award of fees in this case, the Court excluded from consideration certain fees expended in relation to the Defendants' *Yost* counterclaim after Tyler

Dixon withdrew from the litigation. In addition the Court, based on its own personal knowledge of the length of the trial on the issue of attorney fees, has awarded to the Movant twenty-two hours in legal fees associated with the actual attorneys fees hearing, these hours being included in the sum shown here.

AND IT IS SO ORDERED, this 18th day of December, 1989.

/s/ Luther Alverson
LUTHER ALVERSON
Judge
Fulton Superior Court
Atlanta Judicial Circuit

Hugh W. Gibert
J. Melvin England

APPENDIX K

STATUTES AND RULE INVOLVED

O.C.G.A. Section 9-15-14

9-15-14. Litigation costs and attorney's fees assessed for frivolous actions and defenses.

(a) In any civil action in any court of record of this state, reasonable and necessary attorney's fees and expenses of litigation shall be awarded to any party against whom another party has asserted a claim, defense, or other position with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not be reasonably believed that a court would accept the asserted claim, defense, or other position. Attorney's fees and expenses so awarded shall be assessed against the party asserting such claim, defense, or other position, or against that party's attorney, or against both in such manner as is just.

(b) The court may assess reasonable and necessary attorney's fees and expenses of litigation in any civil action in any court of record if, upon the motion of any party or the court itself, it finds that an attorney or party brought or defended an action, or any part thereof, that lacked substantial justification or that the action, or any part thereof, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceeding by other improper conduct, including, but not limited to, abuses of discovery procedures available under Chapter 11 of this title, the "Georgia Civil Practice Act." As used in this Code section, "lacked substantial justification" means substantially frivolous, substantially groundless, or substantially vexatious.

(c) No attorney or party shall be assessed attorney's fees as to any claim or defense which the court deter-

mines was asserted by said attorney or party in a good faith attempt to establish a new theory of law in Georgia if such new theory of law is based on some recognized precedential or persuasive authority.

(d) Attorney's fees and expenses of litigation awarded under this Code section shall not exceed amounts which are reasonable and necessary for defending or asserting the rights of a party.

(e) Attorney's fees and expenses under this Code section may be requested by motion within 45 days after the final disposition of the action.

(f) An award of reasonable and necessary attorney's fees or expenses of litigation under this Code section shall be determined by the court without a jury and shall be made by an order of court which shall constitute and be enforceable as a money judgment.

(g) Reserved.

(h) This Code section shall not apply to proceedings in magistrate courts. However, when a case is appealed from the magistrate court, the appellee may seek litigation expenses incurred below if the appeal lacks substantial justification. (Code 1981, § 9-15-14, enacted by Ga. L. 1986, p. 1591, § 1; Ga. L. 1987, p. 397, § 1; Ga. L. 1989, p. 437, § 1).

O.C.G.A. § 51-7-80 et seq.

ABUSIVE LITIGATION

Effective date.—This article became effective April 3, 1989.

51-7-80. Definitions.

As used in this article, the term:

(1) "Civil proceeding" includes any action, suit, proceeding, counterclaim, cross-claim, third-party claim, or other claim at law or in equity.

(2) "Claim" includes any allegation or contention of fact or law asserted in support of or in opposition to any civil proceeding, defense, motion, or appeal.

(3) "Defense" includes any denial of allegations made by another party in any pleading, motion, or other paper submitted to the court for the purpose of seeking affirmative or negative relief, and any affirmative defense or matter asserted in confession or avoidance.

(4) "Good faith," when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position, means that to the best of a person's or his or her attorney's knowledge, information, and belief, formed honestly after reasonable inquiry, that such civil proceeding, claim, defense, motion, appeal, or other position is well grounded in fact and is either warranted by existing law or by reasonable grounds to believe that an argument for the extension, modification, or reversal of existing law may be successful.

(5) "Malice" means acting with ill will or for a wrongful purpose and may be inferred in an action if the party initiated, continued, or procured civil proceedings or process in a harassing manner or used process for a purpose other than that of securing the proper adjudication of the claim upon which the proceedings are based.

(6) "Person means an individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or unincorporated association of persons with capacity to sue or be sued.

(7) "Without substantial justification," when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position, means that such civil proceeding, claim, defense, motion, appeal, or other position is:

(A) Frivolous;

(B) Groundless in fact or in law; or

(C) Vexatious.

(8) "Wrongful purpose" when used with reference to any civil proceeding, claim, defense, motion, appeal, or other position results in or has the effect of:

(A) Attempting to unjustifiably harass or intimidate another party or witness to the proceeding; or

(B) Attempting to unjustifiably accomplish some ulterior or collateral purpose other than resolving the subject controversy on its merits. (Code 1981, § 51-7-80, enacted by Ga. L. 1989, p. 408, § 2.)

51-7-81. Liability for abusive litigation.

Any person who takes an active part in the initiation, continuation, or procurement of civil proceedings against another shall be liable for abusive litigation if such person acts:

(1) With malice; and

(2) Without substantial justification. (Code 1981, § 51-7-81, enacted by Ga. L. 1989, p. 408, § 2.)

51-7-82. Defenses.

(a) It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted has voluntarily withdrawn, abandoned, discontinued, or dismissed the civil proceeding, claim, defense, motion, appeal, civil process, or other position which the injured person claims constitutes abusive litigation within 30 days after the mailing of the notice required by subsection (a) of Code Section 51-7-84 or prior to a ruling by the court relative to the

civil proceeding, claim, defense, motion, appeal, civil process, or other position, whichever shall first occur; provided, however, that this defense shall not apply where the alleged act of abusive litigation involves the seizure or interference with the use of the injured person's property by process of attachment, execution, garnishment, writ of possession, lis pendens, injunction, restraining order, or similar process which results in special damage to the injured person.

(b) It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted acted in good faith; provided, however, that good faith shall be an affirmative defense and the burden of proof shall be on the person asserting the actions were taken in good faith.

(c) It shall be a complete defense to any claim for abusive litigation that the person against whom a claim of abusive litigation is asserted was substantially successful on the issue forming the basis for the claim of abusive litigation in the underlying civil proceeding. (Code 1981, § 51-7-82, enacted by Ga. L. 1989, p. 408, § 2.)

51-7-83. Measure of damages.

(a) A plaintiff who prevails in an action under this article shall be entitled to all damages allowed by law as proven by the evidence, including costs and expenses of litigation and reasonable attorney's fees.

(b) If the abusive litigation is in a civil proceeding of a court of record and no damages other than costs and expenses of litigation and reasonable attorney's fees are claimed, the procedures provided in Code Section 9-15-14 shall be utilized instead.

(c) No motion filed under Code Section 9-15-14 shall preclude the filing of an action under this article for damages other than costs and expenses of litigation and reasonable attorney's fees. Any ruling under Code Sec-

tion 9-15-14 is conclusive as to the issues resolved therein. (Code 1981, § 51-7-83, enacted by Ga. L. 1989, p. 408, § 2.)

51-7-84. Notice of claim asserted; when action must be brought.

(a) As a condition precedent to any claim for abusive litigation, the person injured by such act shall give written notice by registered or certified mail or some other means evidencing receipt by the addressee to any person against whom such injured person intends to assert a claim for abusive litigation and shall thereby give the person against whom an abusive litigation claim is contemplated an opportunity to voluntarily withdraw, abandon, discontinue, or dismiss the civil proceeding, claim, defense, motion, appeal, civil process, or other position. Such notice shall identify the civil proceeding, claim, defense, motion, appeal, civil process, or other position which the injured person claims constitutes abusive litigation.

(b) An action or claim under this article requires the final termination of the proceeding in which the alleged abusive litigation occurred and must be brought within one year of the date of final termination. (Code 1981, § 51-7-84, enacted by Ga. L. 1989, p. 408, § 2.)

51-7-85. Exclusive remedy.

On and after April 3, 1989, no claim other than as provided in this article or in Code Section 9-15-14 shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that claims filed prior to such date shall not be affected. This article is the exclusive remedy for abusive litigation. (Code 1981, § 51-7-85, enacted by Ga. L. 1989, p. 408, § 2.)

Code Commission notes.—Pursuant to § 28-9-5, in 1989 "April 3, 1989" was substituted for "the effective date of this article" near the beginning of the Code section.

O.C.G.A. Section 5-6-35

5-6-35. Cases in which application for appeal required; contents, filing, and service of application; exhibits; response by opposing party; issuance of appellate court order granting or denying appeal; procedure following grant of appeal; supersedeas.

(a) Appeals in the following cases shall be taken as provided in this Code section:

(1) Appeals from decisions of the superior courts reviewing decisions of the State Board of Workers' Compensation, the State Board of Education, auditors, state and local administrative agencies, and lower courts by certiorari or de novo proceedings; provided, however, that this provision shall not apply to decisions of the Public Service Commission and probate courts and to cases involving ad valorem taxes and condemnations;

(2) Appeals from judgments or orders in divorce, alimony, child custody, and other domestic relations cases including, but not limited to, granting or refusing a divorce or temporary or permanent alimony, awarding or refusing to change child custody, or holding or declining to hold persons in contempt of such alimony or child custody judgment or orders;

(3) Appeals from cases involving distress or dispossessory warrants in which the only issue to be resolved is the amount of rent due and such amount is $2,500.00 or less;

(4) Appeals from cases involving garnishment or attachment, except as provided in paragraph (5) of subsection (a) of Code Section 5-6-34;

(5) Appeals from orders revoking probation;

(6) Appeals in all actions for damages in which the judgment is $2,500.00 or less;

(7) Appeals, when separate from an original appeal, from the denial of an extraordinary motion for new trial;

(8) Appeals from orders under subsection (d) of Code Section 9-11-60 denying a motion to set aside a judgment or under subsection (e) of Code Section 9-11-60 denying relief upon a complaint in equity to set aside a judgment;

(9) Appeals from orders granting or denying temporary restraining orders;

(10) Appeals from awards of attorney's fees or expenses of litigation under Code Section 9-15-14; and

(11) Appeals from decisions of the state courts reviewing decisions of the magistrate courts by de novo proceedings so long as the subject matter is not otherwise subject to a right of direct appeal.

(b) All appeals taken in cases specified in subsection (a) of this Code section shall be by application in the nature of a petition enumerating the errors to be urged on appeal and stating why the appellate court has jurisdiction. The application shall specify the order or judgment being appealed and, if the order or judgment is interlocutory, the application shall set forth, in addition to the enumeration of errors to be urged, the need for interlocutory appellate review.

(c) The applicant shall include as exhibits to the petition a copy of the order or judgment being appealed and should include a copy of the petition or motion which led directly to the order or judgment being appealed and a copy of any responses to the petition or motion. An applicant may include copies of such other parts of the record or transcript as he deems appropriate. No certification of such copies by the clerk of the trial court shall be necessary in conjunction with the application.

(d) The application shall be filed with the clerk of the Supreme Court or the Court of Appeals within 30 days of the entry of the order, decision, or judgment complained of and a copy of the application, together with a list of those parts of the record included with the application, shall be served upon the opposing party or parties as provided by law, except that the service shall be perfected at or before the filing of the application. When a motion for new trial, a motion in arrest of judgment, or a motion for judgment notwithstanding the verdict has been filed, the application shall be filed within 30 days after the entry of the order granting, overruling, or otherwise finally disposing of the motion.

(e) The opposing party or parties shall have ten days from the date on which the application is filed to file a response. The response may be accompanied by copies of the record in the same manner as is allowed with the application. The response may point out that the decision of the trial court was not error, or that the enumeration of error cannot be considered on appeal for lack of a transcript of evidence or for other reasons.

(f) The Supreme Court or the Court of Appeals shall issue an order granting or denying such an appeal within 15 days of the date on which the response of the opposing party or parties is filed with the court or, on the event that no response is filed, within 25 days of the date on which the application was filed.

(g) Within ten days after an order is issued granting the appeal, the applicant, to secure a review of the issues, shall file a notice of appeal as provided by law. The procedure thereafter shall be the same as in other appeals.

(h) The filing of an application for appeal shall act as a supersedeas to the extent that a notice of appeal acts as supersedeas.

(i) This Code section shall not affect Code Section 9-14-52, relating to practice as to appeals in certain

habeas corpus cases. (Ga. L. 1979, p. 619, §§ 3, 6; Ga. L. 1982, p. 3, § 5; Ga. L. 1984, p. 22, § 5; Ga. L. 1984, p. 599, § 2; Ga. L. 1986, p. 1591, § 2; Ga. L. 1988, p. 1357, § 1.)

SUPREME COURT RULES

X. OPINIONS AND JUDGMENTS

Rule 56. Each judgment shall show on its face the votes, nonparticipation, or disqualification of each Justice.

Rule 57. A disqualified Justice shall be replaced by a Judge whenever deemed necessary or upon reasonable request by any party.

Rule 58. Justices concurring agree with the opinion and judgment. Justices concurring specially or in the judgment only do not agree with all that is said in the opinion. Justices dissenting disagree with the opinion and judgment.

Rule 59. Affirmance without opinion may be rendered when the court determines one or more of the following circumstances exists and is dispositive of the appeal:

(1) The evidence supports the judgment;

(2) No harmful error of law, properly raised and requiring reversal, appears;

(3) The judgment of the court below adequately explains the decision and an opinion would have no precedential value.

APPENDIX L

PARTIES AND RELATED PERSONS OR ENTITIES

1. *Petitioner.*

   Tyler C. Dixon, was initial counsel for the Plaintiffs in the underlying case, and respondent to a motion filed by Hubert/Chamberlain for assessment of attorneys fees under O.C.G.A. Section 9-15-14.

2. *Plaintiffs.*

   Alexander H. Lostocco ("Lostocco"). See 4(F). MManTec, Inc. ("MManTec"), a Georgia corporation. See 4(E). Professional Auto Care, Inc. ("PACI") a Georgia corporation. See 4(B).

3. *Defendants.*

   S. Alan Aycock ("Aycock"),
   Tripoint Holdings Ltd. ("Tripoint Holdings"), a Georgia Limited Partnership,
   Tripoint Development Group, Inc. ("Tripoint Development"), a Georgia corporation.

   —The above Defendants are referred to collectively as Aycock/Tripoint and had previously been represented by Hubert/Chamberlain regarding certain of the underlying transactions.

   Richard N. Hubert ("Hubert"),
   Chamberlain, Hrdlicka, White, Johnson & Williams ("Chamberlain") a law firm with offices in Houston, Texas and Atlanta, Georgia, and in which Hubert is a partner.

   —The above Defendants are referred collectively as Hubert/Chamberlain and were the movants under O.C.G.A. Section 9-15-14 seeking attorneys fees against Petitioner and Plaintiffs.

4. *Entities/Persons.*

(A) *Airport Parking Venture I* ("APVI" or "Carport"). A Georgia General Partnership, the pertinent partners of which are:

—Jinna Management, Inc. ("Jinna"), a Georgia corporation, the President and majority stockholder of which is Lostocco. This corporation had a management contract to manage APVI for an accrued management fee of $100,000.00 per year. The contract expired 12-5-88, but was terminated early by APVI after the Hubert letter and Aycock memo.

—Spalding Partners Ltd. ("Spalding"), a Georgia limited partnership, the general partners of which were Ronald Cates ("Cates") and Carl E. Jones ("Jones").

—Hartsfield Carport Limited ("Hartsfield"), a Georgia limited partnership, the general partner of which is Richard Felker. Mr. Felker was the major financial partner of APVI.

—Tripoint Holdings, Ltd., a Georgia limited partnership, the three principals of which are Aycock, Price and Berman.

—Other out of state partners including Irving Napert, Melvin Rosenhaus and Joseph Slavik.

—APVI owns and operates a remote parking facility near the Atlanta Airport on Camp Creek Parkway known as The Carport.

(B) *Professional Auto Care, Inc.* ("PACI"). Plaintiff PACI is a Georgia corporation which was a tenant of APVI and operated a car wash and auto lube shop. Initially its stockholders were Lostocco, Cates and Jones. There was a subsequent stock offering in which Jerry Davis

("Davis") and Barry Filbey ("Filbey") acquired 20% of the stock each, so that the stock ownership was Lostocco with 30%, Cates with 15%, Jones with 15%, Davis with 20% and Filbey with 20%. Thereafter Jones sold his stock to Cates making Cates a 30% owner. Cates thereafter sold his stock (including the stock he acquired from Jones) to Stephanie Jilek ("Jilek"). Aycock/Tripoint negotiated on behalf of APVI for the PACI lease with APVI, and Aycock signed the lease on behalf of APVI.

(C) *Tripoint.* Tripoint Holdings, Ltd. ("Tripoint Holdings") and Tripoint Development Group, Inc. ("Tripoint Development"), a limited partnership and corporation, respectively, the three principals of which are Aycock, John Price ("Price") and Marc Berman ("Berman"). Tripoint Holdings was a general partner of APVI which was initially in charge of the development and construction of The Carport. As such, Tripoint Holdings caused APVI to contract with Tripoint Development to construct The Carport as the contractor.

(D) *Richard N. Hubert, Esq.* Hubert and his law firm, Chamberlain, represented Aycock in efforts to remove Plaintiff Lostocco as managing partner of APVI. Hubert also represented Tripoint Development in a suit it filed via third party complaint against APVI.

(E) *MManTec, Inc.* Plaintiff MManTec is a corporation, the majority stockholder of which is Lostocco. Jilek owns 10% of the stock. Lostocco is President of MManTec, and Jilek is its comptroller and Chief Financial Officer. MManTec provides technical maintenance and facility management and personnel. It provided all personnel

for The Carport, and also provided and handled all payroll and employee benefits for The Carport and PACI.

(F) *Alexander H. Lostocco.* Plaintiff Lostocco was President of Plaintiff PACI and Plaintiff MMan-Tec, and acted as a managing general partner of APVI until removed shortly after the acts and communications complained of by the Plaintiffs in the underlying case.

APPENDIX M

CARPORT—LEGAL QUESTIONS & STRATEGY

A. *Major Problems/Allegations*

THEFT/ILLEGAL ACTIVITIES

1. False insurance audit invoice submitted ($15,000)
2. False car wash reimbursement invoice submitted ($10,000)
3. Cash/Money Laundering (over $30,000)

ALLEGED MISMANAGEMENT

4. Sexual harassment of staff
5. Staff advised by Managing Partner not to disclose damaging information to other partners.
6. Doctoring of management reports to hide information from other partners

CONFLICT OF INTEREST WITH PACI

7. Unpaid rent to CarPort from car wash (Note car wash is owned by Al Lostocco—Carport's Managing Partner
8. CarPort uniforms provided to car wash personnel—no reimbursement
9. Thefts of radar detectors may have occurred at car wash—but were paid CarPort
10. Conflict of interest with Managing Partner's mistress handling CarPort's accounting and management/PACI staff is handling van maintenance
11. Conflict of interest with Delta—Undisclosed ownership interest of Harris Morris—a Delta Manager—in Lostocco's interest in the CarPort.

OUTSTANDING UNRESOLVED ISSUES WITH MANAGEMENT

12. No detailed documentation on taxes/benefits paid to CarPort employees

13. Lack of consultation with Partners on major decisions

14. Managing Partner not paying selected outstanding invoices which were contracted by Tripoint as developer of project. Tripoint and APVI are now being sued by vendors. These invoices are very dated and have been passing over for payment of other, more recent bills.

MISAPPROPRIATION OF PARTNERSHIP ASSETS

15. Use of CarPort staff on non-CarPort projects:

—Unauthorized investigation of other cities by current Carport personnel—Note: Current partnership has clearly stated intention not to develop Carports together in the future. Yet, manager and comptroller were spending 30-50% of their time on these other projects while in APVI's employ.

—Mmantec/PACI accounting performed by CarPort staff

16. Payment of invoices for investigation of other cities from CarPort funds (Travel, Design, etc.)

B. *Alternatives*

1. Evict Current Management

2. Force Buyout of Tripoint

Priorities—What We Want

Priority 1—Force Buyout @ $100,000/point minimum
—Keep CarPort Name and Software Rights

—Have Cash Calls/Defaults Adjusted for Illegal/Improper Expenditures Made to Date

Priority 2—Evict Current Management and Have Them Forfeit Back Pay
—Influence Selection of New Manager
—Have Cash Calls/Defaults Adjusted for Illegal Expenditures to Date

C. *Approach*

1. Get Sworn Statements From Staff
2. File Civil Suit Seeking:

—Dismissal of Management
—Repayment of Misappropriated Funds
—Force a Dissolution Sale of CarPort (?)
—Possible Damages

Or

3. Confront Partners With Statements and Seek Negotiated Settlement.

And/Or

4. File Criminal Charges Against Certain Partners

D. *Questions*

1. Can Partners Counter-sue Tripoint?
2. Best Way to Obtain Statements and Other Evidence from Staff?
3. Legal-Suit/Options—Other Approaches?
4. + of Publicity to Case on Current And Future Tripoint CarPorts?
5. Is Involuntary Bankruptcy an Option?
6. Implication of Our Actions on Felker's Ability to Sell Limited Partnership Interest?
7. How to Limit Uncontrolled Criminal Prosecution and Publicity if We Decide to Go Civil Suit Only?
8. IRS Problems, RICO Statute, Lenders Recourse or Probable Action?

CARPORT QUESTIONS

Theft/Illegal

1. How were employee benefits billed to CarPort?

2. Did you ever question or request supporting detail for these invoices?

   What was requested?

   What was the result?

   Was documentation sufficient?

3. How was workmen's compensation billed?

   Was CarPort ever audited by the insurance company?

   If so, what were the results?

   Describe the events leading up to the last worker's comp bill to the CarPort.

4. Did you ever receive questionable invoices from either PACI (carwash), Mantec (payroll) or Mr. Lostocco for his personal expenses? If so, how were they handled?

   Were you ever pressured to pay bills you considered improper?

5. Were there any cash transactions between CarPort and any partner? If so, how were they handled, booked, documented?

   Were government reports filed to report these transactions?

Alleged Mismanagement

1. Are you aware of any sexual misconduct/harassment between CarPort staff members and CarPort partners or management?

   How are you aware?

   Specifics?

2. Were CarPort managers/staff ever advised to:

—withhold information from partners?
—alter reports to hide problems?
—Hide/downplay maintenance problems?
—Hide/downplay theft problems, particularly in relation to certain car care vendors?

3. Were financial statements ever altered?

4. Are you aware of any "special deals" or questionable relationships between CarPort partners and vendors/ related parties?

5. In the last six months, how much time did Mr. Lostocco spend at the CarPort?

Did you feel a lack of supervisoin?

Conflicts of Interest

1. Where any CarPort tenants pastdue in rent? If so, were any related parties?

Detail the amounts/facts for rent in arrears.

Were any tenants consistently past-due?

2. Were CarPort uniforms ever supplied to tenants? If so, was Car Port reimbursed? Which tenants?

3. Did you ever have reason to believe or suspect that radar detector thefts were related to cars being serviced? Any specific vendor?

4. Did you ever study a specific time period and analyze car thefts versus cars serviced or washed?

Misappropriation of Assets

1. How did you spend your working time at CarPort? What projects? What percentage of your time?

2. During your employ at CarPort, did you ever work on non-CarPort companies or projects? If so, what? How much time? When did this occur?

3. Did the CarPort ever pay invoices in 1988 for "deals" in other cities, i.e., travel, research, site planning, engineering?

If so, how were these invoices reflected on the books?

5. Who authorized their payment?

6. Were you advised not to discuss this with other partners?

APPENDIX N

CHAMBERLAIN, HRDLICKA, WHITE, JOHNSON & WILLIAMS
A Partnership of Individuals and Professional Corporations
Attorneys at Law
1400 Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303
Telephone (404) 659-1410

August 22, 1988

BY HAND DELIVERY

Mr. S. Alan Aycock
c/o Tripoint Holdings, Ltd.
770 Old Roswell Place, Suite F-400
Roswell, Georgia 30077

Re: *Airport Parking Venture I*

Dear Alan:

Pursuant to your request, I have had an occasion to interview and take the testimony of Messrs. Alexander, Batson and Ms. Farrell in regard to the pending lawsuit.

While reviewing these matters, we delved into the questions of misfeasance with regard to insurance audits, car reimbursement invoices and cash payments at the Carport Parking Venture I facility. There was evidence to support our concerns of false billing between the related companies in each of these areas both with regard to Al Lostocco, PACI and Mantec.

Further inquiry was made into questions of corporate mismanagement as relates to sexual involvement with members of management and staff, the failure to meet the partner's fiduciary obligation as to informing other partners as to the condition of the business and what we

call "gun decked" records, which reflect directly and on the financial well being of the partnership.

It is clear that there exists conflicts of interest between APVI, Mantec and PACI, that there are questionable activities as relates to thefts of radar detectors and that Mr. Harris Morris, a Delta Manager, is, and has been a silent but active member of the Carport operation. Mr. Morris' position with Delta Airlines could be a source of critical importance to APVI as relates to a conflict of interest. This situation will be exascerbated by the known attempt to conceal his identity and to explcit the Delta/APVI relationship. These furtive activities will give it the appearance of conspiracy.

From discussion of both you and the former employees that I interviewed, it is clear that information was withheld from you during critical times, that payments required under the partnership agreement have simply not been made and that bills to certain suppliers and service contractors have been ignored to the point of lawsuit. These activities indicate mismanagement on a scale sufficient to require that you promptly discuss the situation with your current partners and consider remedies that may be available to you, including the advisibility of legal action to protect your interest as well as reporting such activities to the appropriate federal or state authorities, including but not restricted to invoicing criminal and securities sanction.

All of the former employees who gave evidence seemed to be unanimous in their assertions that some of their activities were diverted from Airport Parking Venture I's business and that while employed by APVI they were directed to spend time in developing other Carport locations or engaging in accounting activities for Mantec and TAC.

Other details, such as payment of invoices for investigation of sites in other cities, travel expenses and design

services are likewise matters which APVI has been paying for for some months.

Given the present posture of the case, I can only conclude that their has been a violation of the partnership agreement in numerous particulars, that there has been a breach of the partner's fiduciary obligation to his other partners and that we could have information which justified a review of this testimony by the County District Attorney's office. The involvement with Delta Airline personnel and their favored treatment at Carport could present a delicate question as to our ongoing relationship with our largest customer. Nevertheless, the conflict of interest that exists in this situation is readily apparent and requires some immediate attention.

I would invite you to discuss this with your partners and get back to me as soon as possible in order that we might formulate some reasonable course of action to conclude this situation. In general terms such courses of action could be the removal of the partner, the request for a receivership or other legal and reporting remedies that may be appropriate for the partnership. I can only foresee future IRS problems and further involvement with lenders and securities regulators

Based on sworn testimony, we feel you have strong grounds for several courses of legal action, should you wish to proceed.

I look forward to hearing from you in the near future.

Yours very truly,

/s/ Richard N. Hubert
RICHARD N. HUBERT

RNH:ecg

APPENDIX O

LAW OFFICES
RAIFORD, DIXON & THACKSTON
120 Allen Road
Atlanta, Georgia 30328
(404) 847-0860

August 30, 1988

Personal and Confidential Certified Mail Receipt
No. P 657 201 343

Mr. Richard N. Hubert
Chamberlain, Hrdlicka, White, Johnson & Williams
1400 Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303

Re: Your August 22, 1988 letter to Mr. S. Alan Aycock referencing "Airport Parking Venture I"

Dear Mr. Hubert:

As you know this firm and the undersigned represent Professional Auto Care, Inc., MManTec, Inc. and, as a result of such representation, Mr. A. H. Lostocco. We are also counsel to Airport Parking Venture I ("APVI") in certain matters.

We have been provided a copy of your August 22, 1988 hand delivered letter to Mr. S. Alan Aycock, your client. We believe that letter constitutes a defamatory and libelous publication. Indeed, certain of your comments are libelous per se.

It is clear that the letter was drafted with the intent and for the purpose that it be disseminated by your client to partners and business associates of our clients, and possibly others. Since such a result, which has happened, was clearly foreseeable, we view your letter to be just as

libelous as its publication through dissemination of copies by your client.

It is particularly offensive since there was no effort whatsoever to direct any such communication to our client, or to provide him with an opportunity to respond to any questions, objections or inquiries you or your client might have. Instead, you undertook to conduct a clandestine "investigation" much in the nature of an inquisition. Then, still without affording our clients any opportunity to respond to what we believe to be false and irresponsible accusations, you delivered a letter with the foreseeable result being that such letter would be used as a malicious weapon by your client to defame and libel our clients.

Where there are suspicions of misfeasance, the common practice is to request an audit. However, neither you nor your client requested an audit, preferring instead the above mentioned clandestine activities. While you make reference to many alleged improprieties, you do so with vague and conclusory allegations, and you give no hard evidence as to any. Accordingly, we must insist that you immediately provide us with any and all facts and documents upon which you base your accusations. We would also like an explanation for the occasion to "take the testimony of Messrs. Alexander, Batson and Ms. Farrell in regard to the pending lawsuit." What lawsuit? Was the testimony taken by deposition? I am counsel of record for APVI in pending litigation, and have received no notice of any depositions or other discovery.

The self-serving accusations you made in your letter are both false and irresponsible. The same is true as to the threats of criminal prosecution and other action. In fact, we feel that your letter violates the ethical consideration which prohibits a lawyer's threatening criminal prosecution to gain an advantage in a civil matter. It is a grave and serious matter when a lay person makes irresponsible accusations of criminal conduct, but such ac-

cusations are even more inexcusable when made by a lawyer. We will not sit idly by while you and your client launch a vicious attempt to destroy our clients' good business reputation.

Your client's entity is in wilful default of its obligations under the partnership agreement. It is clear that he is now simply attempting to coerce others (through libel, threats and intimidation) to buy out such partnership interest before he loses it as a result of his own default.

Accordingly, we demand an immediate written retraction and apology sent to everyone to whom the defamatory letter was published. We would also want some confirmation as to such delivery, including the names and addresses of all persons to whom the letter was delivered, or with whom the contents of the letter (or its subject matter) were discussed.

I look forward to your early response.

Sincerely,

/s/ Tyler Dixon
TYLER DIXON

TCD/ps

APPENDIX P

LAW OFFICES
RAIFORD, DIXON & THACKSTON
120 Allen Road
Atlanta, Georgia 30328
(404) 847-0860

September 16, 1988

Mr. Richard N. Hubert
Chamberlain, Hrdlicka, White, Johnson & Williams
1400 Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303

Dear Mr. Hubert:

I have not yet received any reply to my letter to you dated August 30, 1988. Our return receipt indicates that you received same on August 31. Please respond.

Also, our client has received a letter from Mr. Alan Aycock demanding payment by The Carport of various invoices, one of which being your invoice to him for attorneys fees. Please let me know if you represent Mr. Aycock on those matters. I would like to respond to his letters, but do not wish to respond directly to him if you are going to be representing him on those matters. In any event, The Carport has no intention of paying your firm's attorneys fees for services performed by you on behalf of Mr. Aycock.

Please advise.

Sincerely,

/s/ Tyler Dixon
TYLER DIXON

TCD/ps

APPENDIX Q

CHAMBERLAIN, HRDLICKA, WHITE, JOHNSON & WILLIAMS
A Partnership of Individuals and Professional
Corporations
Attorneys at Law
1400 Harris Tower
233 Peachtree Street, N.E.
Atlanta, Georgia 30303
Telephone (404) 659-1410

September 16, 1988

Tyler Charles Dixon, P.C.
Raiford, Dixon & Thackston
120 Allen Road
Atlanta, Georgia 30328

Dear Mr. Dixon:

It is not my custom to reply to letters such as that directed to me on August 30, 1988, about the business of my client.

I represent Tripoint Holdings, Ltd. and have responded to certain questions asked me by them. We have conducted what we regard as due diligence investigation concerning partnership business. It is not clandestine investigation and if you believe that it is, or, that you have been defamed, then sir, I leave you to your remedies.

I trust this is response enough to what I regard as extremely unprofessional conduct.

Yours very truly,

/s/ Richard N. Hubert
RICHARD N. HUBERT

RHN:ecg
a:700rnh.22

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

No. 90-1669

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TYLER C. DIXON,

Petitioner,

v.

RICHARD N. HUBERT and CHAMBERLAIN, HRDLICKA, WHITE, JOHNSON AND WILLIAMS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

---

BRIEF FOR THE RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

HUGH W. GIBERT
ARNALL GOLDEN & GREGORY
55 Park Place, Suite 400
Atlanta, Georgia 30335
(404) 577-5100

Attorneys for Respondents Richard N. Hubert and Chamberlain, Hrdlicka, White, Johnson & Williams

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Respondents object to the Petitioner's "Questions Presented" both because they are presented in violation of United States Supreme Court Rule 14.1.(a) and because they were not raised in the trial court.

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JURISDICTION

Contrary to Petitioner's assertion, Petitioner did not "timely raise[ ] the constitutional questions of denial of due process and equal protection of the laws under the Fourteenth Amendment." Petitioner's Brief at 2. Specifically, Petitioner filed only one document in the trial court that even touched on the United States and Georgia Constitutions. That document was entitled "Motion for Continuance and for Bench Trial (with Alternative Motion to Declare Statute Unconstitutional)," and is attached hereto as Appendix A. After the trial court gave Petitioner both a continuance and a bench trial, he never again raised any constitutional issues until after he lost and appealed.

STATEMENT OF THE CASE

A simple recitation of what actually occurred in this case should make it clear why this is not a proper case for a writ of certiorari. Among other things, it will be demonstrated that Petitioner has repeatedly misstated the facts, and continues to do so, has mischaracterized the actions and rulings of the Superior Court, the Court of Appeals, and the Supreme Court of Georgia, and asks this Court to rule on numerous issues that were not properly presented in the state courts and in most cases not presented at all.

Alexander Lostocco, the Plaintiff below and Petitioner's client at the commencement of this suit, controlled Jinna Management, Inc. ("Jinna"). Jinna was the managing partner in Airport Parking Venture I ("APVI"), a general partnership that operated a business known as the "Carport." Alan Aycock, one of the Defendants below, was a partner in Tripoint Holdings, Ltd. ("Tripoint"), which was also a partner

in APVI. T. 16, 205.[1] Thus, in essence, Mr. Lostocco and Mr. Aycock were partners.

When the Carport began losing a lot of money, on the order of a million dollars a year, Mr. Aycock became concerned. T. 16, 19, 140. On behalf of himself and Tripoint he went to see Respondent Richard N. Hubert, an attorney, for advice about protecting his investment. *Id.* Respondent Chamberlain, Hrdlicka, White, Johnson and Williams ("CHWJW") is Mr. Hubert's law firm. T.138.

Mr. Hubert conducted a preliminary investigation that corroborated many of the suspicions and concerns that Mr. Aycock had communicated to Mr. Hubert when he was retained. T. 146; T. 490-92. Even so, Mr. Hubert did not advise Mr. Aycock to file suit immediately, as he would have been justified in doing. Instead, he wrote a letter to his client reporting that he had conducted an investigation and that there was sworn evidence to support Mr. Aycock's belief that the Carport was being mismanaged in numerous very serious ways. *See* Letter from Richard N. Hubert, Esq. to Alan S. Aycock (Aug. 22, 1988), Appendix N to the Petition for Writ of Certiorari; T. 148, 490-92. Mr. Hubert indicated in the letter that various courses of action—for example, seeking a receivership—should be considered. At the close of the letter, Mr. Hubert advised Mr. Aycock to discuss the matter with his partners—discuss the matter, *not* distribute the letter—and get back to Mr. Hubert so that a proper course of action could be chosen. T. 492.

That is where Mr. Hubert's involvement in the events leading to this lawsuit began and ended. He

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[1] References to the trial transcript will be cited as T. ____ .

was retained, he conducted a preliminary investigation, and he wrote a confidential letter of advice to his client. He did nothing else. T. 148.

As it turned out, Mr. Aycock, concerned about his interest in APVI, contacted Richard Felker, another partner in the Carport, and told Mr. Felker that he had consulted counsel. Mr. Felker asked whether Mr. Aycock had received anything in writing from his attorney and Mr. Aycock said he had. Mr. Felker then asked for a copy of the letter and Mr. Aycock gave him one. T. 20-21. Mr. Felker then hired an accounting firm, Coopers & Lybrand, to perform an audit of the Carport's books. T. 22.

Somehow a copy of the letter wound up in Mr. Lostocco's hands. Mr. Lostocco's suit[2] against Mr. Aycock, Mr. Hubert and CHWJW followed. *See* Complaint (filed Oct. 5, 1988), R. 17. Count I of the Complaint, as amended, was styled "Defamation/Invasion of Privacy," and appeared to allege that Mr. Hubert's letter advising Mr. Aycock defamed Mr. Lostocco and invaded his privacy. R. 19-23. Count II of the Complaint, as amended, alleged that the same letter constituted tortious interference with Mr. Lostocco's contractual relations. R. 23-25. Count III of

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[2] Actually, Mr. Lostocco was not the only Plaintiff. Mr. Dixon also sued on behalf of Professional Auto Care, Inc. and MmanTec, Inc., two of Mr. Lostocco's companies, even though he has never articulated any theory under which those companies might have had a cause of action. Because it seemed so apparent that even Mr. Lostocco had no grounds for a lawsuit, Respondents Hubert and CHWJW have never argued at length the frivolousness of a suit by the two companies, but their inclusion without explanation does indicate Mr. Dixon's nonchalance about filing legal claims.

the Complaint sought punitive damages, and Count IV sought the expenses of the litigation. R. 25-26. CHWJW apparently was sued on the basis of vicarious liability.

Although the Petition filed in this Court has much to say about the document "Carport-Legal Questions & Strategy,"[3] which was furnished to Mr. Hubert by his client, Aycock, that document was not mentioned in the Complaint. The Complaint clearly relies upon the Hubert letter and reliance upon the other document is after the fact. At the deposition of Mr. Lostocco, taken early in the case, the very first question (by Hubert's counsel) and answer were as follows:

> Mr. Gibert: Mr. Lostocco, as you know, I represent Richard Hubert and Chamberlain, Hrdlicka, who are the law firm and lawyers who are also the authors of the exhibit today that has been exhibited as D1, and lets see if I can get through this quickly. Precisely what are your grievances against Mr. Hubert? Rather, are they limited to that letter?
>
> Mr. Lostocco: Yes.

Deposition of Alexander Lostocco ("Lostocco Depo.") at 210, Appendix B at 11a.[4]. Thus, it was established from the beginning that Mr. Dixon's client's only

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[3] Petitioner calls this document the "Strategies and Tactics Memo," for some reason eschewing its actual heading.

[4] Excerpts from Mr. Lostocco's deposition are attached as Appendix B.

grievance against Mr. Hubert was that he did not like what Mr. Hubert said in a letter to his own (Hubert's) client.

Apparently because the basis of the Complaint was an attorney's letter to his client, which under Georgia law is conditionally, if not absolutely, privileged, Mr. Dixon included in the Complaint allegations that Mr. Hubert acted with malice and that it was Mr. Hubert's "intent, expectation and foresight" that the letter be distributed. R. 20. During Mr. Lostocco's deposition, however, it became quite clear that there was no evidence to support those assertions. With respect to Mr. Hubert's alleged malice, Mr. Lostocco testified as follows:

> *Q.* Okay. And you have no reason to suppose that Dick Hubert holds any personal malice or animosity toward you, do you?
> *A.* No.
> . . . .
> *Q.* I want you to tell me if you know some facts that indicate to you that Dick Hubert had some purpose to do something other than write and give his client some advice. He, personally, Dick Hubert personally. Do you have some basis for thinking he had some purpose other than to write and give his client some advice?
> *A.* I don't know.
> *Q.* You don't know of any, [or] you don't have any basis?
> *A.* I just said I don't know.

Lostocco Depo. at 213, 216, Appendix B at 12a, 13a. Likewise, after *Mr. Dixon* stated in the deposition

that the letter was distributed "in accordance with the instructions of the letter," the following exchange between Mr. Hubert's counsel and Mr. Lostocco took place.

> *Q.* You find some instructions in the letter that the letter be disseminated?
> *A.* Sure. Second page, second or third page.
> *Q.* Where? Are you referring to the language "I would invite you to discuss this with your partners?"
> *A.* Yeah.
>
> . . . .
>
> *Q.* Now, is the letter, what's in the letter and the fact that Dick Felker had possession of it your entire evidence on that point?
> *A.* Yeah.

Id. at 217, 225-26, Appendix B at 14a-16a. In short, Mr. Dixon's entire "evidence" on Mr. Hubert's alleged malice and/or conspiracy to injure Mr. Lostocco was the single sentence from the letter that follows:

> I would invite you to discuss this with your partners and get back to me as soon as possible in order that we might formulate some reasonable course of action to conclude this situation.

Petition for Writ of Certiorari Appendix N, at 45a.

Even if this language could bear the extraordinary construction Mr. Dixon lent it, and thereby support a defamation claim, Mr. Dixon still had no evidence whatsoever to justify pursuing the tortious interference and invasion of privacy claims. Mr. Dixon's theory with respect to tortious interference was that the letter caused Richard Felker to ask for Mr. Lostocco's

resignation, *see* T. 120, but Mr. Lostocco and Mr. Dixon were aware that that was not true. Richard Felker testified at the hearing on attorneys' fees that he told Mr. Lostocco that he was being asked to resign because reports from the auditors and from Ron Cates, an interim manager, indicated that the Carport had been mismanaged. T. 95-97, 103. Thus there was no proof that the letter had caused any interference.

With respect to the privacy claim, there was, essentially, no *theory*. When asked in his deposition about the basis for this claim, Mr. Lostocco complained that someone had sent his wife a newspaper article reporting allegations of sexual harassment that had been lodged against him. Lostocco Depo. at 229, Appendix B at 17a. Counsel then inquired whether Mr. Lostocco had any reason to believe that Mr. Hubert was involved with that. Mr. Lostocco replied that he did not. *Id.*

In view of these statements by the Plaintiff, counsel for Mr. Hubert and CHWJW informed Mr. Dixon, both orally and in writing, that the Plaintiffs' claims were entirely without merit. T. 111-12. Mr. Dixon acknowledged in his testimony in the attorneys' fees hearing that Mr. Hubert's counsel repeatedly warned him that the suit was frivolous and cited case law in support of that conclusion. T. 112. At Mr. Lostocco's deposition, counsel for Mr. Hubert informed Mr. Dixon that he would be putting himself personally at risk under O.C.G.A. § 9-15-14 if he continued with the suit. T. 111-12. Mr. Dixon persisted nonetheless, causing

Mr. Hubert and CHWJW to incur approximately $60,000[5] in legal fees and expenses. T. 150-51.

Finally, on June 22, 1989, after eight months of expensive trial preparation, the Plaintiffs voluntarily dismissed the entire action. *See* R. 127. Mr. Hubert and CHWJW filed a timely motion for attorneys' fees under O.C.G.A. § 9-15-14. *See* R. 136. Section 9-15-14 requires an award of attorneys' fees against either a party or his attorney when they have asserted a claim "with respect to which there existed such a complete absence of any justiciable issue of law or fact that it could not reasonably be believed that a court would accept the asserted claim." *Id.* § 9-15-14(a). The Code section further allows the court discretion to award fees against a party or his attorney when an action brought "lacked substantial justification." *Id.* § 9-15-14(b). The matter was extensively briefed by all the parties. *See* R. 202, 246, 321, 519, 777.

On October 11, 1989, three months after Mr. Hubert and CHWJW filed their motion for attorneys' fees and two days prior to a scheduled hearing on the motion, Mr. Dixon filed a motion for a continuance and a bench trial. *See* Motion for Continuance and for Bench Trial (with Alternative Motion to Declare Statute Unconstitutional) (Oct. 11, 1989), R. 1526, Appendix A. The motion asked for "an evidentiary trial, including the right to present witnesses on his behalf, and the right to confront and cross examine those witnesses presented by other parties." Appendix A at 2a-3a. The motion also asked for a

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[5] The suit brought by Mr. Dixon against Respondents sought damages in excess of $10,000,000.

six-month discovery period dated from August 14, 1989. *Id.* at 6a.

The trial court did not enter a formal order on the motion. The case was removed from the calendar, however, and an evidentiary trial was scheduled for December 3, over seven weeks later. No particular discovery period was approved, but Mr. Dixon served Mr. Hubert and CHWJW with interrogatories and document requests on October 25. *See* R. 1548, 1553. Mr. Hubert and CHWJW responded without objection.

When court commenced on December 4, the Court proposed that jury selection begin, but both parties agreed that the trial was to be non-jury. T. 13. Mr. Hubert undertook the burden of proving that the Plaintiffs' claims against him were such as to justify an award of fees under O.C.G.A. § 9-15-14. Mr. Dixon's counsel cross-examined Mr. Hubert's witnesses and then Mr. Dixon put on his own case, including witnesses and documentary evidence. *See* T. 1-485.

On December 19, the trial court filed an opinion and order awarding Mr. Hubert and CHWJW their fees. *See* R. 1618. Because it was not asked by any party to do so, the Court did not file findings of fact and conclusions of law. The Georgia Civil Practice Act provides that in all nonjury trials in courts of record, "*the court shall upon request of any party* made prior to such ruling, find the facts specially and shall state separately its conclusions of law." *See* O.C.G.A. § 9-11-52(a) (emphasis added).

Petitioner filed an application for discretionary appeal to the Court of Appeals. The Court of Appeals denied the application and denied Mr. Dixon's motion

for rehearing, both without opinion. *See* Appendices I, H to Petition for Writ of Certiorari.

Mr. Dixon then petitioned the Supreme Court of Georgia for a writ of certiorari. The Georgia Supreme Court granted the writ and remanded to the Superior Court for findings of fact and conclusions of law (even though neither party had requested them in the trial court). *See* Appendix G to Petition for Writ of Certiorari. The Superior Court complied. *See* Appendix E to Petition for Writ of Certiorari. Thereafter, the matter was briefed and orally argued in the Supreme Court, which then affirmed the lower court without opinion. *See* Appendix D to Petition for Writ of Certiorari.

These are the facts of this case. It is appropriate, however, to address more specifically some of the more egregious misstatements in the Petition for Certiorari.

First, the Plaintiffs' claims did not have anything to do with the "Strategies & Tactics Memo." Mr. Dixon's reliance on the Memo, which is actually entitled "Carport—Legal *Questions* & Strategy" ("Legal Questions Memo" or "Memo") is an attempt to come up with a justification for the suit after the fact. The Complaint makes no mention whatsoever of the Legal Questions Memo, or any publication of it. In his deposition, Mr. Lostocco testified that the only basis for his defamation action against Mr. Hubert was the Hubert letter. *See* Lostocco Depo. at 210, Appendix B at 11a. In the Plaintiffs' responses to Mr. Hubert's interrogatories, no mention was made of the Memo, and in neither Mr. Dixon's nor the Plaintiffs' brief opposing Mr. Hubert's motion for award of attorneys' fees is the Memo treated as a basis for the action.

See R. 255-304, 327-48. Moreover, even if it were appropriate for the Court to consider this post hoc justification, the Legal Questions Memo does not include any statements of fact, but merely topics as to which Mr. Aycock thought Mr. Hubert should inquire.

Second, it is not true that Mr. Hubert "was specifically retained by Mr. Aycock to accomplish the expressly stated goals outlined in the Strategies & Tactics Memo," as Mr. Dixon asserts as fact. Petition for Writ of Certiorari at 3. Mr. Hubert testified that he was hired to help Mr. Aycock avoid losing any more of the money he and Tripoint had invested in APVI. T. 139-42. There is no evidence whatsoever to the contrary.

Third, Mr. Hubert never made any "threats" to anyone, as Petitioner insists. *See* Petition for Writ of Certiorari at 3. He wrote a letter to his own client in which he stated the view that there existed facts that suggested that one or more crimes might have been committed. He was right to be concerned since Mr. Lostocco had engaged in large cash transactions with the Carport that might have involved money laundering, tax fraud, or both. *See* T. 62-63.

Fourth, it is not true, as he would have this Court believe, that Petitioner asserted his constitutional attack on O.C.G.A. § 9-15-14 in every court. *See* Petition for Writ of Certiorari at 2. On the contrary, Dixon filed a motion in the trial court asking for a continuance and an evidentiary hearing before the Court without a jury. In the motion, he said that *if he did not get such a hearing* then, in that event, section 9-15-14 would be unconstitutional. *See* Appendix A at 6a. Once the continuance and evidentiary hearing

were granted, he was not heard from again on any constitutional issue.

Fifth, it is not true that the trial court "ruled that Dixon's good faith and due diligence were not relevant." Petition for Writ of Certiorari at 6. A reading of the relevant pages of the transcript indicates that the trial court rendered a ruling only as to Mr. Dixon's testimony concerning another attorney's opinion. *See* T. 315-21. The court then expressly permitted Mr. Dixon to testify about the new theories of law he was trying to create. T. 321.

The court did state, halfway through Mr. Dixon's explanation of the new theories he was pursuing, that the court did not see how those theories had anything to do with this case. T. 318. Put in context, however, this was not a ruling on the relevance of good faith in general: it was a ruling on whether even the theory Mr. Dixon was espousing would overcome the legal obstacles in suing *Mr. Hubert* in addition to Mr. Aycock. Everything to which Mr. Dixon had testified before the court made the statement had had to do with publication of a document among *partners*, not as between an attorney and his client. *See* T. 315-17.

Sixth, it is absolutely false that the trial court "refused to allow attorneys Dixon called as witnesses to testify concerning . . . their concurrence with his analysis of the issues of attorney-client privilege, privilege, and publication." Petition for Writ of Certiorari at 6, 7. Indeed, conspicuously absent from the trial were any attempts to call the attorneys with whom Mr. Dixon claims to have spoken on the justifiability of the case. At the trial Dixon testified that he talked with some lawyers who concurred with his analysis of the case. Since those lawyers could have been sub-

poenaed to testify, the Court refused to permit Dixon to give expert testimony for them. *See* T. 311.

The foregoing are merely examples of the misstatements of the record contained in the Petition. There are so many of them that it would be impossible in thirty pages to correct them all. Many of them—with each new brief additional ones crop up—were made in briefs to the Georgia Court of Appeals and Supreme Court, which rejected them but did not dignify them with an opinion.

In sum, the facts boil down to these. Mr. Dixon brought a defamation suit on behalf of his client for what Mr. Hubert said in a letter of advice to *his* client. In doing so, Mr. Dixon had no evidence to suggest either that Mr. Hubert intended the letter to be distributed—or in legal terms, published—or that Mr. Hubert acted with malice that would overcome the attorney-client privilege.

Mr. Dixon's suit also alleged that Mr. Hubert had invaded Mr. Lostocco's privacy. As it turned out, this complaint was directed at whoever sent an article discussing a sexual harassment suit against Mr. Lostocco to Mr. Lostocco's wife. Again, there was no evidence that Mr. Hubert was involved in any way.

Mr. Dixon's suit also alleged that Mr. Hubert had tortiously interfered with Mr. Lostocco's contractual relations with The Carport. And once again, there was no evidence of malice to overcome the attorney-client privilege applicable to the Hubert letter. Additionally, there was no evidence that it was the letter that caused The Carport partnership to fire Mr. Lostocco as managing partner. Instead there was evi-

dence that Mr. Lostocco was fired when an outside audit revealed Mr. Lostocco's mismanagement.

Mr. Dixon now wishes to avoid accountability for his actions by claiming that he has been denied his constitutional rights. In truth, however, he has never been denied anything he asked for, and every procedural issue he properly raised was actually decided in his favor.

ARGUMENT

In what is now his sixth appellate brief, Petitioner continues to assert that the trial he was afforded violated his right to due process and that the statute under which Respondent was awarded attorneys' fees violates the equal protection clause. In each of their appellate responses, Respondents have pointed out that Petitioner never raised any due process or equal protection objections in the trial court other than demands for a continuance, discovery, the opportunity to present witnesses, the opportunity to cross-examine witnesses, and a trial, *all of which he received.* Yet still, in his seventh appellate brief, Petitioner will not own up to the fact that he raised constitutional issues only on appeal, after the frivolousness of his conduct in suing Respondents had been conclusively determined. He apparently feels no qualms about ignoring what this Court and the courts of Georgia require with respect to the preservation of objections.

Because Petitioner comes to this Court raising issues on which the trial court had no opportunity to rule, his Petition for Writ of Certiorari should be denied. For sound reasons of comity and judicial economy, this Court has long held that it will not decide questions not raised in the lower court. *Youakim v.*

Miller, 425 U.S. 231, 234 (1980); *Adickes v. Kress & Co.*, 398 U.S. 146, 147 n.2 (1970); *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). Indeed, it is likely because the Georgia appellate courts abide by this same rule that they affirmed the trial court's judgment without opinion. *See Frashier v. State*, 217 Ga. 593, 593, 124 S.E.2d 279 (1962); *Renfroe v. Wallace*, 214 Ga. 685,686, 107 S.E.2d 225 (1959).

The Petition should also be denied because it does not involve any issues appropriate for this Court's consideration under United States Supreme Court Rule 10. The Georgia Supreme Court's decision does not conflict with the decision of any other state court of last resort or a court of appeals, and even Petitioner does not so claim. *See* Supreme Court Rule 10(b). Nor is there involved "an important question of federal law which has not been, but should be, settled by this Court," or a decision that conflicts with decisions of this Court. *See* Supreme Court Rule 10(c). All that is involved is an award of attorneys' fees—rendered only after discovery and a trial—against an attorney who abused the judicial process by bringing a patently frivolous action. Moreover, the facts involved are so extreme that a similar case is unlikely to arise.

CONCLUSION

Because Petitioner never raised the constitutional issues he argues, was granted everything he asked for by the trial court, and has presented no reasons why the writ of certiorari should be granted, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HUGH W. GIBERT
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(404) 577-5100

Attorneys for Respondents
Richard N. Hubert and
Chamberlain, Hrdlicka, White,
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APPENDICES

APPENDICES

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APPENDIX A

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE
NO. D-61506

ALEXANDER H. LOSTOCCO, MMANTEC, INC., AND PROFESSIONAL AUTO CARE, INC.

PLAINTIFFS

VS.

S. ALAN AYCOCK, TRIPOINT DEVELOPMENT GROUP, INC., TRIPOINT HOLDINGS, LTD., RICHARD N. HUBERT, and CHAMBERLAIN, HRDLICKA, WHITE JOHNSON & WILLIAMS (a General Partnership) and John Doe, Jane Roe, and others

DEFENDANTS

RESPONDENT DIXON'S MOTION FOR CONTINUANCE AND FOR BENCH TRIAL (WITH ALTERNATIVE MOTION TO DECLARE STATUTE UNCONSTITUTIONAL)

COMES NOW Tyler Dixon, Respondent to the motion filed by the Defendants Richard N. Hubert ("Hubert") and Chamberlain, Hrdlicka, White, Johnson & Williams, ("Chamberlain"), and files this his motion requesting a continuance of the motion hearing currently scheduled for Friday, October 13, 1989,and for an evidentiary bench trial, respectfully showing to the Court as follows:

1. The Respondent Dixon (Movant herein) was formerly counsel for the Plaintiffs in the above styled case, and withdrew from such representation as a result of the development of a conflict of interest requiring the Respondent to be a material witness in the action. Also, the Plaintiffs

voluntarily dismissed their complaint without prejudice on June 22, 1989.

2. On or about July 10, 1989 the Movants Hubert and [p. 2] Chamberlain filed a motion pursuant to O.C.G.A. Section 9-15-14 for attorneys fees, seeking such relief from the Plaintiffs and their former counsel, the Respondent Dixon.

3. Upon the service of said motion by Movants Hubert and Chamberlain served by mail on July 10, 1989, the Respondent Dixon was, *for the very first time*, made a party litigant to this action.

4. Within the time prescribed by law, the Respondent Dixon filed and served his response to said motion on August 14, 1989. Therefore, the issue was joined as to the Respondent Dixon for the first time on August 14, 1989.

5. At the time, the case was scheduled for Arbitration in September, but that was removed at the instance and request of other parties because of problems with their schedules. The case was again placed upon an arbitration calendar for October 13, and the related *Yost* counterclaim appeared on a jury trial calendar for October 9, 1989, but at the request of Movants Hubert and Chamberlain, the case has been removed from the arbitration calendar and from the trial calendar, (over the objection of the Plaintiffs) but the case has not been removed from the motions calendar. The Plaintiffs, through their counsel, Janet Litt, have requested that the case be continued from the October 13 motions calendar, but the Movants Hubert and Chamberlain have objected to such continuance, and have indicated that the other Movants (Aycock/Tripoint) join in that objection.

6. The Respondent Dixon has been "joined" (by O.C.G.A. Section 9-15-14 motion) as a party to this case in which more than $48,000.00 damages are sought against him. Respondent Dixon is [p. 3] entitled to an evidentiary trial,

including the right to present witnesses on his behalf, and the right to confront and cross examine those witnesses presented by other parties. To deny such a right would be a denial of Respondent Dixon's constitutional rights of due process and equal protection under the Georgia and U.S. Constitutions. U.S. Const., Amend. V and Amend. XIV, Section 1; Ga. Const., Art. I, Section 1, Par. 1 and Par 2.

7. The Court has indicated that it intends to allow each side only fifteen minutes oral argument at the hearing on October 13, 1989. That would mean that the Respondent Dixon would be exposed to a possible adverse money judgment for damages for more than $48,000.00 approximately two months after the issue was joined as to Respondent Dixon without a trial. Fifteen minutes of oral argument (which must be shared with counsel for the Plaintiff Respondents) is clearly not a "fair hearing" as contemplated by due process and equal protection, especially since any ruling by the Court is not subject to a direct appeal. This effectively denies Respondent Dixon a sufficient time within which to conduct discovery, obtain appropriate expert witnesses to testify on his behalf, and to otherwise prepare his defense. Given the voluminous size of the record in this case and the complexity of the issues involved, obtaining an expert witness, and providing such witness with the requisite information and records in order to allow such witness to properly analyze same requires a significant amount of time.

8. Prior to the filing of Movant's motion seeking relief against Respondent Dixon, all of Respondent's efforts in this case [p. 4] were on behalf of the Plaintiffs and directed toward their best interests. Not until Movants made Respondent a litigant by filing their motion, has Respondent been in a position to act on his own behalf or view the case from the perspective of protecting himself.

9. Respondent Dixon has contacted J. Melvin England, Esq. and requested him to testify on Respondent's behalf as an expert witness. Mr. England has agreed. The anticipated testimony from Mr. England is key to Respondent's defense, but Mr. England has advised Respondent that, because of his schedule, he will be unable to adequately prepare and submit his expert opinion (whether in the form of an affidavit or oral testimony) for as much as thirty (30) days. Therefore, Respondent requests a continuance from the motions calendar until such time as said witness has had an opportunity to prepare and submit his expert opinion testimony, and Respondent has had an opportunity to supplement his response, if appropriate, based on such expert opinion testimony. Respondent also contacted Gregory Jones, Esq. who indicated he, too, would testify (either through testimony or affidavit) on Respondent Dixon's behalf. Apparently there was some confusion when the jury trial and arbitration hearing were continued, because Mr. Jones left town and will not be back in town (and available for testimony or execution of an affidavit) until October 16, 1989.

10. Furthermore, the Respondent is entitled to discovery. Substantial damages are being sought against Respondent, and it would be unjust and unlawful to require the Respondent to respond for final adjudication without first affording the Respondent an opportunity at proper discovery as in all other civil cases. [p. 5] Uniform Superior Court Rule 5 provides that all discovery must be completed within six months of the filing of the answer (unless the time is extended). While this Rule does not purport to guarantee litigants six months to complete discovery, it should be considered as an influential guideline as to what time period is reasonable for the completion of discovery in the normal course. In that regard, it should be noted that the parties to the main case all consented and stipulated to an extension of the discovery period in the main case. This would imply that the main case was sufficiently

complex as to require additional time for the completion of discovery. Furthermore, it should be noted that the case was dismissed voluntarily by the Plaintiffs prior to the expiration of such extended discovery period, and that discovery was not complete in the main case at the time of such dismissal. In their motions and supplemental briefing, the Movants have now raised virtually all of the issues which would or could have been adjudicated in the main case, as well as other issues.[1] These issues require further discovery, especially on the part of Respondent Dixon who had no opportunity to conduct discovery on his own behalf or from the perspective of claims asserted against him until July, 1989.

11. Given the substantial relief being sought against Respondent Dixon by Movants Hubert and Chamberlain (currently in excess of $48,000.00 with the suggestion by Movants Hubert and [p. 6] Chamberlain that said claim will continue to increase), the Respondent Dixon should be provided the same opportunity to defend himself as is afforded all Defendants in civil litigation. Namely, Respondent Dixon should be allowed a reasonable opportunity to conduct discovery, and thereafter have an evidentiary trial which would include the right to call witnesses to testify on his behalf, and the right to be confronted by and cross examine those witnesses called by his adversaries and other parties. A denial of such right and opportunity would be a denial of Respondent Dixon's constitutional rights under the Georgia and U.S. Constitutions. This denial would be especially prejudicial to Respondent Dixon given the fact that pursuant to O.C.G.A. Section 5-6-35(a)(10), rulings or orders entered on motions filed under O.C.G.A. Section 9-15-14 are not subject to direct appeal. Therefore, to have any order of this Court reviewed on such a motion, an

[1] For example, none of the Defendants raised the affirmative defense of "truth" in their defensive pleadings in the main case, yet they now seem to be arguing that issue in their O.C.G.A. Section 9-15-14 motions.

appealing party must apply to the appellate court for the right to appeal. Therefore, construing O.C.G.A. Section 9-15-14 and O.C.G.A. Section 5-6-35(a)(10), together, any construction or application of said statutes which would deny a respondent's right to discovery and an evidentiary trial (including the right to call witnesses on his on behalf and to confront and cross examine those witnesses called to testify against him), would subject a respondent to the imposition of a money judgment without due process *and* without any vested right to have the trial court's ruling reviewed by an appellate court. Such a construction or application would clearly be an unconstitutional denial of due process and equal protection.

WHEREFORE, the Respondent respectfully moves this Court for [p. 7] an Order removing this case from the October 13, 1989 motions calendar and continuing this case until some date after January 14, 1990 which would be six months after August 14, 1989, (the date of Respondent Dixon's initial response in this case) so that Respondent Dixon can conduct the necessary or appropriate discovery; and for an Order thereafter scheduling this case for a bench trial involving oral testimony in accordance with the procedures commonly followed in civil cases, including the right of the Respondent Dixon to confront and cross examine those witnesses called to testify or submit evidence against Respondent Dixon; that in the event said statutes are to be construed so as to deny respondents the right to discovery and a trial (including the right to present oral testimony, and the right to confront and cross-examine those testifying against Respondent) then Respondent Dixon moves for an Order of this Court striking down O.C.G.A. Section 9-15-14 as being violative of the due process and equal protection under the Georgia and U.S. Constitutions (cited above), and Respondent Dixon prays for such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

[s]_____

Tyler C. Dixon
Pro se
State Bar No. 223400

Raiford, Dixon & Thackston
120 Allen Road
Atlanta, Georgia 30328
404-847-0860

IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

CIVIL ACTION FILE
NO. D-61506

ALEXANDER H. LOSTOCCO, MMANTEC, INC., AND PROFESSIONAL AUTO CARE, INC.

PLAINTIFFS

VS.

S. ALAN AYCOCK, TRIPOINT DEVELOPMENT GROUP, INC., TRIPOINT HOLDINGS, LTD., RICHARD N. HUBERT, and CHAMBERLAIN, HRDLICKA, WHITE JOHNSON & WILLIAMS (a General Partnership) and John Doe, Jane Roe, and others)

DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned, certifies that he has this day served opposing counsel with a genuine copy of the foregoing Motion for Continuance and for Bench Trial and Brief in support of said motion.

Such service was accomplished by hand delivery to said counsel as follows:

Hugh W. Gibert, Esq.
Arnall Golden & Gregory
55 Park Place
Atlanta, Georgia 30335

Janet Litt, Esq.
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Mr. Kirk W. Watkins, Esq.
Suite 700
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309

This 11th day of October, 1989.

Respectfully submitted,

[s]_____

Tyler C. Dixon
Pro se
State Bar No. 223400

Raiford, Dixon & Thackston
120 Allen Road
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404-847-0860

APPENDIX B

**IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON
STATE OF GEORGIA**

CIVIL ACTION FILE NO. D61506

ALEXANDER H. LOSTOCCO, MMANTEC, INC., and PROFESSIONAL AUTO CARE, INC.,

Plaintiffs,

vs.

S. ALAN AYCOCK, TRIPOINT DEVELOPMENT GROUP, INC., TRIPOINT HOLDINGS, LTD., RICHARD N. HUBERT, and CHAMBERLAIN, HRDLICKA, WHITE JOHNSON & WILLIAMS, (a General Partnership), and JOHN DOE, JANE ROE, and others,

Defendants.

Deposition of ALEXANDER H. LOSTOCCO, taken on behalf of the Defendants Aycock, Tripoint Development Group, Inc., and Tripoint Holdings, Ltd., in accordance with the Georgia Civil Practice Act, before Mary Ruth Miller, Certified Court Reporter and Notary Public, at One Concourse Parkway, Suite 710, Atlanta, Georgia, on the 21st day of March, 1989, at 9:45 a.m.

I wanted to ask everything that relates to Dick Hubert, but I am going to try not to, you know, not to go over all the same ground again. I am not going to go over all the same ground again, though I am not swearing that we won't ever touch on any of the same things, but that's all. I was simply going to do it on the theory that he had a whole lot of things which really are not of much concern to me, I don't think.

Mr. Dixon: Okay. That's fine with me.

CROSS-EXAMINATION

BY MR. GIBERT:

Q. Mr. Lostocco, as you know, I represent Richard Hubert and Chamberlain Hrdlicka, who are the law firm and lawyers who are also the authors of the exhibit today that's been exhibited as D-1, and let's see if I can get through this quickly.

Precisely what are your grievances against Mr. Hubert? Rather, are they limited to that letter?

A. Yes.

Q. Okay. And you have testified that you consider that the letter was defamatory, but all of the other references in the Complaint to the Defendant, well, take, for example, the Defendants in Count 2, Paragraph 22, you use the word "Defendants," plural, but you said "Certain Defendants contracted with persons or

courtroom?

A. I heard his name mentioned and I saw him.

Q. Okay. And you have no reason to suppose that Dick Hubert holds any personal malice or animosity toward you, do you?

A. No.

Q. And you do have such a view about Alan Aycock, I take it?

A. Well, only that somehow or other together they conspired to do this, whatever the reason may be.

Q. I understand that, but you don't—do you believe that Alan Aycock has got some personal animosity toward you?

A. Yes.

Q. Do you believe Dick Hubert's got some personal animosity towards you?

A. I don't know.

Q. You don't have any reason to suppose he would since he never saw you before; is that right?

A. That would appear on the surface.

Q. Okay. And so Dick Hubert writes this letter as a lawyer writing to his client. Is that the interpretation you place on that letter?

A. No.

Q. No?

entirely from the reading of the letter? That's what I want to know.

A. Is this a trial or a deposition?

MR. DIXON: He's asking you a question.

BY MR. GIBERT

Q. A deposition is one of the first stages in a trial, Mr. Lostocco. You can be sure of that.

A. I mean, I answer it and I am being asked the same thing again.

Q. I want you to tell me if you know some facts that indicate to you that Dick Hubert had some purpose to do something other than write and give his client some advice. He, personally, Dick Hubert personally. Do you have some basis for thinking he had some purpose other than to write and give his client some advice?

A. I don't know.

Q. You don't know of any, you don't have any basis?

A. I just said I don't know.

MR. DIXON: Other than what he's already identified. I mean, he's already testified several times.

MR. GIBERT: He's testified that he concludes that from reading the letter. That's the way I interpret that.

MR. DIXON: That's not what he said.

BY MR. GIBERT:

Q. Well, that's what I'm trying to find out. It's a simple question. If there's something else—

A. What is it?

MR. DIXON: He's already testified, the fact that it was ultimately disseminated in connection with the instructions of the letter.

BY MR. GIBERT:

Q. You find some instructions in the letter that the letter be disseminated?

A. Sure. Second page, second or third page.

Q. Where? Are you referring to the language "I would invite you to discuss this with your partners"?

A. Yeah.

Q. Now, it doesn't say, I'd invite you to disseminate this letter, but that is the language you're relying on, "I invite you to discuss this with your partners"?

A. Yeah.

Q. Do you think it's improper for Mr. Aycock to discuss these grievances he had with his partners?

A. All his partners. He didn't discuss them with me.

Q. Well, but would you have found it improper

interrogation and I will simply wait till he's finished and I'll take mine.

MR. DIXON: We've already jumped to you. Like I said when I first agreed to do that, I didn't want to go back and forth. Let's go ahead.

MR. GIBERT: Okay. Then we'll go on. We'll go on.

BY MR. GIBERT:

Q. In Paragraph 11 of the Complaint you say that "The Defendants Hubert and Chamberlain, Hrdlicka," his firm, "delivered the letter of August 22nd with the intent, expectation and foresight that the same," that means the letter, "would be delivered by the Defendants to other persons." Now, what is your evidence in support of that, if any?

A. Just read it in here. It says that he's going to talk about it, "I would invite you to discuss this with your partners."

Q. Is that the entire evidence that you have in support of that statement?

A. I saw the letter in the hands of Dick Felker, didn't I?

Q. Well, the statement is a statement about Dick Hubert's intent and expectation. Now, is the letter, what's in the letter and the fact that Dick Felker had

possession of it your entire evidence on that point?

A. Yeah.

Q. Okay. You said that such was done. What does "such" mean?

A. What paragraph?

Q. Right after that word we were just, sentence were talking about.

A. Which line?

Q. We are in Paragraph 11. You say "such was done as a malicious and wrongful attempt" and so forth. What's the word, what's "such" mean?

A. Dissemination of the letter. That's used in a legal phrase. I am not—

Q. You say, in other words, dissemination of the letter, is that the way you interpret that?

A. That's the way I would interpret it, but then I'm not an attorney and this was written by an attorney.

Q. Was this complaint filed with your approval and consent?

A. Yes.

Q. It speaks on your behalf?

A. Yes.

Q. It makes your contentions?

A. Yes, but it was, you know, it's put into legal terms so, you know, I'm not—

A. Right.

Q. "And continued other malicious, false and defamatory communications," you're not talking about Dick Hubert there, are you?

A. No.

Q. Then you said, "Defendants have also wrongfully invaded the privacy of Plaintiff Lostocco." What does that relate to?

A. It dealt into my personal life, sending letters to my home.

Q. You have no reason to believe Dick Hubert did that?

A. No.

Q. Did you finish your answer when I asked you about privacy?

A. Yes.

Q. Then there are a series of things discussed here when you say Aycock and Tripoint then published the defamatory letter and the thing which they gave just before or just after you left for Paris, you don't have any reason to believe Dick Hubert had anything to do with that, do you?

A. Repeat. Would you please indicate—

Q. This Paragraph 15 of the Complaint, which I think generally talks about the, well, it says Aycock

* * * *